No. 82-2120

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS F. SMITH, JR., et al.,

*Petitioners,*

—v.—

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## QUESTIONS PRESENTED

Plaintiffs, won the entirety of the relief sought on the merits: a free appropriate public education for handicapped child. Based upon a common nucleus of operative fact, plaintiffs alleged substantial constitutional claims through 42 U.S.C. § 1983 which were not addressed, a Rehabilitation Act claim which also was not addressed, and a claim under the Education for All Handicapped Children Act on which they prevailed. Plaintiffs were denied all attorneys fees.

I. Can plaintiffs, who allege substantial constitutional claims which are not addressed in view of plaintiffs' total success on a non-fee statutory claim, be denied an award of attorneys fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, contrary to this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980), and contrary to the express intent of Congress?

II. Can plaintiffs, who allege a substantial Rehabilitation Act claim in addition to substantial constitutional claims none of which is addressed in view of plaintiffs' total success on a non-fee statutory claim, be denied an award of attorneys fees under the Rehabilitation Act, 29 U.S.C. § 794a(b), contrary to the express intent of Congress?

## LIST OF THE PARTIES

Petitioners, plaintiffs-appellees below, are THOMAS F. SMITH, JR., and URSULA J. SMITH, parents, guardians, and next friends of Thomas F. Smith, III, and THOMAS ["TOMMY"] F. SMITH, III.

Respondents, defendants-appellants below, are WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, and ARTHUR PONARELLI, Rhode Island Commissioner of Education.

The local education agency defendant below, the Cumberland School Committee, is

no longer a party to this proceeding, see infra at 4 n.1.

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## OPINIONS BELOW

The decision of the U.S. Court of Appeals for the First Circuit, reversing the trial court and denying attorneys fees to petitioners, is reported at 703 F.2d 4 (1st Cir. 1983). A copy of the decision, entered on March 24, 1983, is attached hereto as Appendix A, infra at A. 1-21.

The decision of the U.S. District Court for the District of Rhode Island, awarding attorneys fees to petitioners, is unreported. The decision is set forth in a final order entered on June 11, 1982, in an earlier order of June 5, 1982 with two attachments, and in the transcript of the trial court's oral opinion from the bench on April 30, 1982, all of which are attached hereto as Appendix B, infra at A. 22-58.

## JURISDICTION OF THIS COURT

The judgment of the U.S. Court of Appeals for the First Circuit was entered on March 24, 1983. Jurisdiction is conferred on this

Court by 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended, provides in pertinent part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42]. . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The section of the Rehabilitation Act authorizing fees, 29 U.S.C. § 794a(b), which was added to the Rehabilitation Act through amendments enacted in 1978, provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

## STATEMENT OF THE CASE

Petitioners -- plaintiffs below -- obtained the entirety of the relief sought through a permanent injunction on the merits. The issues here do not concern the correctness of the decision on the merits, nor the amount of attorneys fees. Instead, the issues presented here arise from the First Circuit's denial of any attorneys fees to petitioners under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 [hereafter the "Fees Act" or "§ 1988"]; and under the Rehabilitation Act, 29 U.S.C. § 794a(b).

On the merits of this case, which was commenced on November 26, 1976, petitioners sought to secure a free appropriate public education for a handicapped child. A. 1-2, 28. In their amended complaint, petitioners alleged claims under the due process and equal protection clauses of the Fourteenth Amendment; under the Rehabilitation Act, 29 U.S.C. § 794; and under the Education for All Handicapped

Children Act, 20 U.S.C. §§ 1401 et seq. [hereafter sometimes the "EAHCA"]. A. 2-3, 34-35.

After initially securing a preliminary injunction on their due process claim, A. 3, 28, 33, petitioners ultimately obtained all of the relief sought on the merits under the Education for All Handicapped Children Act, A. 5, 29-30, 34. The permanent injunction entered in favor of petitioners on June 4, 1981, A. 5, 29, was affirmed by the First Circuit on January 11, 1982, A. 5, 29-30.

Subsequent to the First Circuit's affirmance on the merits, the trial court on June 11, 1982 awarded $32,109 in fees to petitioners against respondents, the state defendants below.[1/] A. 6, 22. In making this award, the trial court held that petitioners were entitled to fees under the Fees Act and under the Rehabilitation Act despite the fact that the

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1. The local education agency defendant -- the Cumberland School Committee -- never contested petitioners' entitlement to fees; it instead settled the matter by paying $8,000 in fees to petitioners. A. 5, 35-36.

Education for All Handicapped Children Act does not itself expressly authorize fees. A. 39-43. This entitlement, the trial court found, arose from the fact that petitioners had specifically alleged claims under "the due process and equal protection clauses of the 14th Amendment" and under "the Rehabilitation Act." A. 34-35. As to the constitutional claims, not only had petitioners won a preliminary injunction on their due process claim, A. 33, but the court also specifically found that petitioners' "equal protection claim" had been "colorable and non-frivolous":

> Be that as it may, enough has been said to establish that the [petitioners had] made a substantial constitutional claim even if that claim ultimately would not have prevailed. [Petitioners] are therefore entitled to attorney's fees to the extent they have prevailed in an action or proceeding to enforce their 1983 claim. 42 U.S.C. Section 1988.

A. 43. Petitioners accordingly were held entitled to fees.

The First Circuit, in the decision under review here, reversed the award of fees and held that "fees are not available here at all." A. 33.[2/] In its view, fees are altogether unavailable for plaintiffs who allege substantial constitutional claims which are not addressed, who allege a substantial Rehabilitation Act claim which is not addressed, and who prevail instead on a claim under the Education for All Handicapped Children Act, a remedial statute which does not expressly authorize fees. A. 7-21.

In reaching this decision, the First Circuit conceded that the issues presented had been widely litigated in the past two years, and that virtually all of the courts of appeals and district courts that had addressed the

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2. The state defendants below -- respondents here -- raised three issues in the First Circuit: the entitlement issue; and two issues as to the amount of the fee award and as to procedure. A. 7. Since the First Circuit held that petitioners here were not entitled to fees, it did not address the remaining two issues. A. 7. The questions presented here, see supra at i, concern only petitioner's entitlement to fees.

issues had rendered decisions contrary to the conclusion reached by the First Circuit. A. 10-13, 21. Moreover, the First Circuit reached its decision without any reference whatsoever to the legislative history of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988; without any analysis of this Court's holding in Maher v. Gagne, 448 U.S. 122 (1980); and also with no evident consideration of the fee provision in the Rehabilitation Act, 29 U.S.C. § 794a(b).

Petitioners here request this Court to issue a writ of certiorari to the U.S. Court of Appeals for the First Circuit, and to summarily reverse the First Circuit's decision or to set this case for plenary review.

## REASONS FOR GRANTING THE WRIT

The denial of a free appropriate education to a handicapped child ordinarily gives rise to three sets of interrelated federal claims arising from the same set of facts: due

process and equal protection claims under the Fourteenth Amendment; a claim under the Rehabilitation Act; and a claim under the Education for All Handicapped Children Act. When the EAHCA claim is dispositive, as it often is in this heavily litigated area, questions then arise as to whether fees are available under the Fees Act and under the Rehabilitation Act in view of the plaintiffs' success on their non-fee claim under the EAHCA.

The fee questions presented here have been addressed in five other courts of appeals' decisions in the past two years. In four of the decisions, rendered in 1982, the courts of appeals allowed fees based on reasoning contrary to that of the First Circuit here but consistent with that of Hensley v. Eckerhart, 51 U.S.L.W. 4552 (U.S. May 16, 1983). See infra at 16-18. A fifth appellate decision provided support for the First Circuit's result. See infra at 18-19. A sixth court of appeals' decision addressed a related issue.

See infra at 19 n.6. Most of the dozens of district court decisions, including the trial court decision reversed by the First Circuit here, have allowed fees contrary to the First Circuit's decision. See infra at 18 n.5.

The split in the circuits caused by the First Circuit's decision on these recurring questions should be resolved by this Court. Resolution of this split, we submit, requires a reversal of the First Circuit's decision in view of the express legislative intent of the Fees Act; this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980); appellate precedent; and the legislative intent of the fee provision in the Rehabilitation Act.

## I. The First Circuit's Decision -- Denying Attorneys Fees in a Case in Which Plaintiffs Presented Substantial Constitutional Claims Which Were Not Addressed in View of the Dispositive Statutory Claim Upon Which Plaintiffs Prevailed -- Is Contrary to the Legislative History of the Civil Rights Attorney's Fees Awards Act, Contrary to the Decisions of This Court, and Contrary to the Courts of Appeals' Decisions on this Issue

There is no question here that petitioners obtained a preliminary injunction on their due process claim, A. 3, 28, 33, or that petitioners' equal protection claim was substantial, A. 43. Nor is there any dispute that all of petitioners' claims arose from a common nucleus of operative fact, for, as the First Circuit found: "The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to [petitioner Tommy Smith] because of his handicap, are factually identical to the EAHCA claims." A. 15. In fact, it is because of this factual premise that the First Circuit denied all fees: "We hold only that where, as here, the constitutional allegations arise from the same factual underpinnings as the statutory claims, section 1988 does not apply." A. 17.

Given the substantiality of petitioners' constitutional claims arising from the same common nucleus of operative fact as petitioners'

non-fee claim, the First Circuit erred in holding fees unavailable to petitioners under the Fees Act.

### A. In Enacting the Fees Act, Congress Directed That Attorneys Fees Are to be Awarded in a Case Such as This Where Plaintiffs Allege a Substantial Constitutional Claim but Prevail on a Dispositive Statutory Claim Arising From a Common Nucleus of Operative Fact

The extensive legislative history set forth in the House and Senate Reports accompanying the Fees Act is quite familiar to this Court, and in fact has repeatedly been found to be dispositive of fee issues before this Court. See, e.g., Maher v. Gagne, 448 U.S. 122 (1980); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980); Hutto v. Finney, 437 U.S. 678 (1978); see also, Hanrahan v. Hampton, 446 U.S. 754 (1980) (per curiam summary reversal).

The legislative history is similarly dispositive here. In the House Report, Congress expressly recognized that fees are to be made

available to plaintiffs who prevail on a non-fee statutory claim so long as plaintiffs alleged a substantial constitutional claim arising from a common nucleus of operative fact:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v. Lavine, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' United Mine Workers v. Gibbs, supra, at 725.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.7 (1976).

The foregoing legislative history, which was not cited or even alluded to by the First Circuit below, compels a summary reversal of the First Circuit's decision.

B. This Court's Decision in Maher v. Gagne, 448 U.S. 122 (1980), Which Addressed a Virtually Identical Issue, Compels Reversal Of the First Circuit's Decision

The conclusive legislative history cited above was quoted with approval and held to be dispositive by the Court in Maher v. Gagne, 488 U.S. 122 (1980). In fact, it was dispositive in two respects. First, this Court held that even if plaintiff's success in Maher had been based only on her Social Security Act claim, she still would have been entitled to fees under the Fees Act because she had alleged due process and equal protection claims which were found to have been substantial but were not addressed by the lower courts. 448 U.S. at 128 n.10.[3/]

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3. This was an alternative holding in Maher since the Court also recognized, 448 U.S. at 128-29, that plaintiffs' Social Security Act claim was a law within the meaning of the "and laws" language of § 1983 in view of Maine v. Thiboutot, 448 U.S. 1 (1980). Although petitioners here have never asserted a Maine v. Thiboutot theory in this case with regard to their claim under the Education for All Handicapped Children Act, the First Circuit in this case nonethe-

[footnote continued on following page]

Second, this Court in Maher rejected defendant's Eleventh Amendment defense by relying on the foregoing legislative history to hold that Congress had acted within its enforcement power when it authorized fees for plaintiffs who prevail on non-fee statutory claims:

> [C]learly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided. We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or

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[footnote continued from previous page]

less held that Middlesex County Sewage Auth. v. Sea Clammers Ass'n, 453 U.S. 1 (1981), provided support for a denial of fees since the Education for All Handicapped Children Act created a comprehensive remedial scheme which arguably cannot be asserted through § 1983. A. 13-17. The Maine v. Thiboutot and Sea Clammers issues, however, are not presented in this case in view of petitioners' substantial constitutional claims, and accordingly are not relevant under this Court's decision in Maher v. Gagne, 448 U.S. 122, 128 (1980). As the Eighth Circuit recognized in circumstances identical to those here, "even if EAHCA cannot be the basis for a § 1983 claim, it does not follow that plaintiff is entitled to no fee award in this case." Robert M. v. Benton, 671 F.2d 1104, 1106 (8th Cir. 1982).

> in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.[15]

448 U.S. at 132. In the accompanying footnote 15, the Court first stated that the "legislative history makes it clear that Congress intended fees to be awarded where a . . . constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the [Fees] Act," and thereafter quoted the relevant legislative history from the House Report in full. 448 U.S. at 132 n.15.

This Court's decision in Maher, which was not at all analyzed by the First Circuit below, compels a summary reversal of the First Circuit's decision.

### C. Courts of Appeals Which Have Addressed the Precise Issue Presented Here Have Rendered Decisions Diametrically Opposite to the Decision of the First Circuit

In view of this Court's decision in Maher, and particularly in view of the legislative

history of the Fees Act, it is not at all surprising that the courts of appeals have routinely held plaintiffs entitled to fees under the Fees Act where plaintiffs asserted a substantial constitutional claim but prevailed on non-fee statutory claims.[4/]

Applying this settled principle of law, the courts of appeals have also held plaintiffs entitled to fees under the Fees Act where plaintiffs alleged a substantial constitutional claim but prevailed on a non-fee statutory claim under the Education for All Handicapped Children Act. Monahan v. Nebraska, 687 F.2d 1164, 1172 (8th Cir. 1982) ("It does not matter that the constitutional, or § 1983, ground was not actually reached, and that the

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4. See, e.g., Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1124-25 (9th Cir. 1981) (successful claim under the Federal Aid for Highways Act coupled with unaddressed due process and equal protection claims); Oldham v. Ehrlich, 617 F.2d 163, 166-68 (8th Cir. 1980) (Social Security Act claim coupled with unaddressed equal protection claim); Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978) (successful claim under the Social Security Act coupled with unaddressed Fourteenth Amendment claim); cf., Doe v. Marshall, 622 F.2d 118, 119-20 (5th Cir. 1980) (successful claim under the Rehabilitation Act prior to the 1978 amendment authorizing fees).

complainant prevailed, to the extent that he did at all, on his EAHCA ground. Where a non-fee claim is joined with a non-frivolous claim under a statute providing for the award of fees, and the plaintiff prevails with respect to his non-fee claim, thus making it unnecessary for the Court to reach the § 1983 claim, an award of fees is nevertheless appropriate."); Robert M. v. Benton, 671 F.2d 1104, 1106 (8th Cir. 1982) ("Here, the complaint contained non-frivolous claims under § 1983 based on the Fourteenth Amendment as well as on EAHCA. . . . In this situation, attorney's fees are awardable to plaintiff, even though the case had been decided on grounds for which an award of fees is normally improper."); Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir. 1982) ("Jurisdiction was properly predicated on allegations of the state's failure to meet statutory and constitutional obligations, and attorneys' fees may be awarded in cases where the prevailing claims are based only on violations of federal

statutes."); cf., Hastings v. Maine-Endwell Central School Dist., 676 F.2d 893, 897 (2d Cir. 1982) (defendants' EAHCA argument that fees should not have been awarded was "baseless" in view of plaintiffs' due process claim).[5/]

Only one court of appeals' decision provides any support for the First Circuit's conclusion here. In Hymes v. Harnett Bd. of Educ., 664 F.2d 410 (4th Cir. 1981), the Fourth Circuit denied fees to a prevailing plaintiff under the EAHCA essentially because, in its view, the EAHCA with its extensive remedial provisions did not fall within the "and laws"

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5. Numerous district courts have similarly held that plaintiffs who prevail under the EAHCA are entitled to fees so long as they alleged substantial constitutional claims. See, e.g., Gary B. v. Cronin, 542 F. Supp. 102, 120-21 (N.D. Ill. 1982); Turillo v. Tyson, 535 F. Supp. 577, 581-82 (D.R.I. 1982); Dep't of Educ. v. Katherine D., 531 F. Supp. 517, 531-32 (D. Hawaii 1982); Dep't of Educ. v. Valenzuela, 524 F. Supp. 261, 264 (D. Hawaii 1981); Mattie T. v. Holladay, 522 F. Supp. 72, 74 (N.D. Miss. 1981); New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391, 399 (D.N.M. 1980); cf., Pastel v. Dist. of Columbia Bd. of Educ., 530 F. Supp. 660 (D.D.C. 1982) (citing numerous cases, and awarding fees under the Rehabilitation Act).

language of § 1983.[6/] At no time, however, did the Fourth Circuit recognize that plaintiff's assertion of a substantial and prevailing due process claim had independent legal consequences under § 1983 and § 1988 flowing from Congress' intent in enacting the Fees Act and flowing as well from this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980). Moreover, since the Fourth Circuit approved an award of fees for the time expended by plaintiff on the due process claim, Hymes, 664 F.2d at 411 n.1, 413 n.4, the Fourth Circuit's fee denial for time spent by the prevailing plaintiff on the successful EAHCA claim arising from the same set of facts places its

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6. In cases where plaintiffs do not allege independent constitutional claims under § 1983, it may be correct in view of Thiboutot and Sea Clammers that § 1983 cannot be invoked solely by alleging a claim under the EAHCA. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981). Petitioners here, however, have never argued that the EAHCA was within the "and laws" language of § 1983. See supra at 13-14 n.3. Instead, petitioners here, like the plaintiffs in the court of appeals' decisions (Monahan, Robert M., Jose P. and Hastings) cited supra at 16-18, and like the plaintiff in Maher v. Gagne, 448 U.S. 122 (1980), alleged independent constitutional violations through § 1983. See supra at 3-5.

decision in conflict with this Court's decision in Hensley v. Eckerhart, 51 U.S.L.W. 4552 (U.S. May 16, 1983).

The First Circuit's decision here, in other words, was rendered virtually without any legal support. The weight of authority in the courts of appeals counsels reversal of the First Circuit's decision.

## II. The First Circuit's Decision Also Is Contrary to the Intent and Uniform Judicial Interpretation of the Fee Provision in the Rehabilitation Act

The First Circuit reversed the trial court's award of fees to petitioners under the Rehabilitation Act "for the same reasons" that it "reject[ed] an attorneys' fees award under section 1988." A. 19. With no analysis of the Rehabilitation Act's fee provision or of its legislative history, the First Circuit held that "the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act." A. 20.

This decision also is legally unsupportable. The earlier enacted 1975 Education for All Handicapped Children Act poses no barrier to an award of fees under the fee provision added to the Rehabilitation Act in 1978.[7/]

Not only does the fee provision in the Rehabilitation Act, 29 U.S.C. § 794a(b), contain language identical to that in the 1976 Fees Act, 42 § 1988,[8/] but the legislative history of the Rehabilitation Act's fee provision expressly incorporated the legislative

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7. The 1978 fee provision was contained in the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2955, 2982, which amended the Rehabilitation Act of 1973 by adding § 505(b) authorizing fees. The fee provision was reported favorably in the Senate Report, the House Report, and the Conference Report. It was explained in considerable detail on the floor of the Senate, see infra at 22-23 n.9.

8. Both statutes provide: "In any action or proceeding to enforce [the applicable statutes], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 29 U.S.C. § 794a(b); 42 U.S.C. § 1988. See supra at 2.

history of the 1976 Fees Act.[9/] The legal conclusions which flow from this congressional intent are twofold.

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9. Senator Cranston, the author of the fee provision which was enacted as 29 U.S.C. § 794a(b), fully explained the coverage and effect of this fee authorization in his remarks on the floor of the Senate:

> Mr. President, an amendment which I have authored, contained in section 505(b) of the reported bill, provides for the allowance of attorneys' fees by a court as part of the costs to the prevailing party, other than the United States, and parallels the Civil Rights Attorneys' Fees Awards Act of 1976 (Public Law 94-559).
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> * * *
>
> Mr. President, I emphasize that it is intended that interpretation of the attorney's fee provision in the committee bill be analagous to interpretations of the Civil Rights Attorney's Fees Act of 1976, Public Law 94-556. The legislative history and expressions of legislative intent with respect to Public Law 94-556 are applicable to the new section 505(b).

124 Cong. Rec. 30346 (1978). See also id. at 30347.

Subsequent to passage by the Senate and by the House and subsequent to the House-Senate Conference, see supra at 21 n.7, the fee provision was explained again on the floor of the Senate, this time by Senator Stafford, the ranking member of the Subcommittee on the Handicapped. Senator Stafford initially observed that "section 505(b) of the conference bill provides for the allowance of attorneys' fees by a court as part of the costs to the prevailing party, other than the United

[footnote continued on next page]

First, by incorporating the legislative history of the 1976 Fees Act, Congress in effect reemphasized that plaintiffs who prevail on a non-fee claim such as a claim under the EAHCA are eligible for fees so long as they alleged a substantial constitutional claim arising from a common nucleus of operative fact. See supra at 9-18. Petitioners accordingly were entitled to fees on the same ground both under the Fees Act of 1976 and under the Rehabilitation Act as amended in 1978, see generally, Jose P. v. Ambach, 669

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[footnote continued from previous page]

States and parallels the Civil Rights Attorneys' Fees Awards Act of 1976 (P.L. 94-559)." 124 Cong. Rec. 37507 (1978). He then stated: "I emphasize that it is intended that interpretation of the attorney's fees provision in the conference bill be analogous to interpretations of the Civil Rights Attorney's Fees Act of 1976; Public Law 94-556. The legislative history and expressions of legislative history and expressions of legislative intent with respect to Public Law 94-556 are applicable to the new section 505(b)." Id. at 37508.

The legislative history of the Fees Act accordingly is fully applicable to fee awards under the Rehabilitation Act. This is also true because of the fact that the Fees Act "is legislation similar in purpose and design to [the Rehabilitation Act's] fee provision." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980).

F.2d 865, 871 n.4 (2d Cir. 1982); cf., Tatro v. Texas, 703 F.2d 823, 831-33 (5th Cir. 1983).

Second, just as "[n]othing in the language of § 1988 conditions the District Court's power to award fees . . . on a judicial determination that plaintiff's rights have been violated," Maher v. Gagne, 448 U.S. 122, 129 (1980), plaintiffs who prevail without winning any judicial ruling on their Rehabilitation Act claim nevertheless are entitled to fees under the Rehabilitation Act's fee provision, Disabled in Action v. Mayor & City Council of Baltimore, 685 F.2d 881 (4th Cir. 1982); Pratt v. Bd. of Educ. of Frederick County, 674 F.2d 259 (4th Cir. 1982); United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980).

Petitioners here, who alleged a substantial Rehabilitation Act claim which was not addressed by the trial court, were eligible for and entitled to fees under the Rehabilitation Act's fee provision, 29 U.S.C. § 794a(b).

## CONCLUSION

The First Circuit's decision in this case is contrary to the express congressional intent of two federal statutes, contrary to this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980), and contrary to all relevant courts of appeals' decisions.

Petitioners request this Court to issue a writ of certiorari to the U.S. Court of Appeals for the First Circuit, and to summarily reverse the First Circuit's decision or to set this case for plenary review.

Dated: June 23, 1983

Respectfully submitted,

E. RICHARD LARSON*
BURT NEUBORNE
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
212/944-9800

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Of Counsel

# APPENDICES

APPENDIX A

THOMAS F. SMITH, JR., et al.,

Plaintiffs, Appellees,

v.

CUMBERLAND SCHOOL COMMITTEE,

et al., Defendants, Appellants.

No. 82-1524.

United States Court of Appeals,
First Circuit.

Argued Jan. 3, 1983.

Decided March 24, 1983.

Before ALDRICH, CAMPBELL and BREYER, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

This is an appeal from an award of attorneys' fees in an action brought to secure a free appropriate public education for a handicapped child. Plaintiff Thomas F. Smith, III

is a handicapped child suffering from cerebral palsy and a variety of physical and emotional handicaps. Since December 1974 he has been enrolled in the Day Hospital Program at Emma Pendelton Bradley Hospital, which all parties agree provides him with an appropriate education. The Cumberland School Committee, Thomas's local education agency, 20 U.S.C. § 1401(8), partially funded his tuition at Bradley for one year. In November 1976, however, the school committee informed Thomas's parents, who are also plaintiffs in this action, that it would cease paying for Thomas's tuition because it believed that the Rhode Lsland Department of Mental Health, Retardation and Hospitals (MHRH) was the agency responsible for financing Thomas's education.

On November 26, 1976 plaintiffs commenced the present action in the United States District Court for the District of Rhode Island. The complaint as amended charged the Cumberland School Committee with violating the fourteenth

amendment to the Constitution, the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1401 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 794, by denying Thomas a free appropriate education, discriminating against him because he was emotionally disturbed, and refusing to grant him an impartial hearing prior to the termination of tuition payments.[1] On December 22, 1976 the district court issued a preliminary injunction requiring the school committee to maintain Thomas at Bradley while plaintiffs exhausted their administrative remedies. On January 20, 1977 a hearing was held before the school committee. The school committee affirmed its prior decision. The plaintiffs then appealed to the Rhode Island

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1. The original complaint only charged that the school committee violated the Constitution by refusing to fund Thomas's education at Bradley pending administrative review of the committee's decision. In May 1978 the complaint was amended to include claims under the newly effective EAHCA, 20 U.S.C. § 1415. On September 16, 1980 the complaint was again amended to include claims under the Rehabilitation Act and the equal protection clause of the Constitution.

Commissioner of Education, one of the appellants here. The Associate Commissioner of Education, the other appellant here, scheduled a hearing for November 2, 1977. The plaintiffs then moved that the Associate Commissioner recuse himself and provide an impartial hearing officer. This motion was denied. Following the hearing, the Associate Commissioner affirmed the school committee's decision. Plaintiffs then amended their complaint to name the Commissioner and Associate Commissioner as defendants.

On December 22, 1978 the district court decided that the controversy before it might be solved by a determination as to which agency was responsible under Rhode Island law for Thomas's education. Accordingly it certified this issue to the Rhode Island Supreme Court,[2] which ruled that the school committee,

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2. Two questions were certified concerning the construction and interaction of R.I.Gen.Laws §§ 16-24-1; 16-25-2 and 40.1-7-1--40.1-7-9.

and not the MHRH, was responsible under state law for paying for Thomas's education. Smith v. Cumberland School Committee, R.I., 415 A.2d 168 (1980). The Rhode Island Supreme Court stated that a contrary result risked placing the state's law in conflict with the federal EAHCA.

After the Rhode Island Supreme Court rendered its decision, the district court found that plaintiffs won all they sought under state law and granted a permanent injunction. Federal statutory and constitutional issues were not reached. We affirmed the district court's judgment in an unpublished decision.

Plaintiffs then sought attorneys' fees. An agreement was reached with the school committee whereby the committee paid $8,000 in attorneys' fees for the costs plaintiffs incurred in securing the preliminary injunction and arguing before the school committee. The district court decided the question of attorneys' fees with regard to the other defendants.

The district court, relying on its decision in Turillo v. Tyson, 535 F.Supp. 577 (D.R.I.1982), found that plaintiffs were entitled to fees under 42 U.S.C. § 1988 because they had stated constitutional section 1983 claims, and under 29 U.S.C. § 794a(b) because they had alleged violation of the Rehabilitation Act. The district court further reasoned that because the plaintiffs were required by the EAHCA to exhaust their administrative remedies, and because the district court refused to hear the federal claims before the state claims were decided by the Rhode Island Supreme Court, the plaintiffs were entitled to attorneys' fees for all of the work done before the state agencies and the state court. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980); Bartholomew v. Watson, 665 F.2d 910 (9th Cir.1982). Fees of $32,109 were awarded. It is from this judgment that the Commissioner and Associate Commissioner appeal.

Appellants raise three issues on appeal. First, they argue that neither section 1988 nor section 794a(b) provide for fees in this case because it was essentially brought under the EAHCA which does not provide for attorneys' fees. Second, they argue that even if fees are available, the district court should not have compensated plaintiffs for the attorneys' work before the state agencies and state court. Third, they argue that the district court erred in accepting an attorney's affidavit rather than original time sheets as evidence of the hours the attorney spent on the case. Because we decide that attorneys' fees are not available here at all, we only discuss that issue.

A. Section 1988

Under what is labelled the American Rule, attorneys' fees are only available as a general matter when statutory authority so provides. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct.

1612, 44 L.Ed.2d 141 (1975). Since the narrow exceptions under the American Rule are not applicable here, our task is to determine whether or not there is statutory authority for awarding attorneys' fees in the present case.

This action and the relief granted fall within the parameters of EAHCA, a federal statute which establishes a comprehensive federal-state scheme for the provision of special education to handicapped children. The complaint alleged that the school committee's refusal to fund Thomas's placement at Bradley denied him a free appropriate public education as defined by the EAHCA. 20 U.S.C. § 1401(18). The complaint also claimed that the hearings provided by the Rhode Island officials did not comply with certain due process provisions imposed by the EAHCA upon participating states because they were not impartial. 20 U.S.C. § 1415(c). And ultimately it was to the EAHCA that the

Rhode Island Supreme Court looked in determining that state law required the school committee to fund Thomas's placement at Bradley. R.I. 415 A.2d at 172. Not only was EAHCA the foundation of plaintiffs' victory, its provisions encompassed all the relief for which plaintiffs now seek attorneys' fees, i.e., all relief beyond the preliminary injunction. See footnote 3, infra.

Yet while EAHCA provides expressly for the bringing of private enforcement actions such as this one, 20 U.S.C. § 1415(e), it contains no provision for attorneys' fees. Hymes v. Harnett County Board of Education, 664 F.2d 410 (4th Cir. 1982). For authority to award fees in the instant case, the district court had to turn to other statutes, primarily to 42 U.S.C. § 1988 which authorizes courts to award attorneys' fees to prevailing parties in actions brought under 42 U.S.C. § 1983. In so doing, the district court relied upon authorities holding that fees may be awarded under

section 1988 when the claim upon which the plaintiff actually prevailed was accompanied by a "substantial," though undecided, section 1983 claim arising from the same nucleus of facts. Lund v. Affleck, 587 F.2d 75, 77 (1st Cir.1978). See, e.g., Luria Bros. & Co., Inc. v. Allen, 672 F.2d 347, 357 (3d Cir.1982); Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir.1981). Here, plaintiffs' section 1983 claims were arguably "substantial" in that, though weak, they would at least have supported federal jurisdiction. See Maher v. Gagne, 448 U.S. 122, 127, 100 S.Ct. 2570, 2573, 65 L.Ed.2d 653 (1980), citing Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Prior to enactment of EAHCA in 1975, one district court had held that the equal protection clause of the Constitution required school districts to provide special education to handicapped children. See Mills v. Board of Education, 348 F.Supp. 866 (D.D.C.1972). And the Eighth Circuit has held that due pro-

cess claims akin to plaintiffs' were sufficiently colorable to sustain a fees award under section 1988. Robert M. v. Benton, 671 F.2d 1104, 1106 (8th Cir. 1982).

But even if plaintiffs' section 1983 claims qualify as "substantial," we do not think that fact alone created authority for fees in a case bottomed so completely on an encompassing federal statute that does not authorize fees. Alyeska makes clear that it is for Congress, not the courts, to pick and choose among types of actions warranting fees. 421 U.S. at 269, 95 S.Ct. at 1627. Thus the question before us remains one of finding affirmative congressional sanction for fees in this situation. We can find none. The federal statute under which relief was obtained here is a far-reaching statutory and administrative scheme for the provision of free appropriate public education for handicapped children. 20 U.S.C. §§ 1401 et seq. While the creating and processing of educational programs for handi-

capped children is left to the states and to state law, the federal Act imposes substantial requirements and standards on the states. The Act not only creates substantive rights for handicapped children, but it also establishes detailed remedial procedures, including provisions for state administrative due process hearings and, as noted, private lawsuits in the federal and state courts to be brought by persons disatisfied with state and local plans for educating handicapped children. Given the Act's comprehensiveness, we do not see how the singular omission of any provision for attorneys' fees can be rectified by recourse to section 1988. See Hymes v. Harnett County Board of Education, 664 F.2d 410 (4th Cir.1981); Anderson v. Thompson, 658 F.2d 1205 (7th Cir.1981); Noe v. Ambach, 542 F.Supp. 70 (S.D.N.Y.1982); Tatro v. Texas, 516 F.Supp. 968 (N.D.Tex.1981). But see Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982); Hastings v. Maine-Endwell School District, 676 F.2d 893 (2d Cir.

1982); Robert M. v. Benton, 671 F.2d 1104; Jose P. v. Ambach, 669 F.2d 865 (2d Cir.1982); Gary B. v. Cronin, 542 F.Supp. 102, 121 (N.D.Ill.1982); Department of Education v. Katherine D., 531 F.Supp. 517 (D. Hawaii 1982).

Support for our view is found in the Supreme Court's recent discussion of section 1983 in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). The Court there considered whether section 1983 created an action for violation of a federal statute when the statute itself was part of an act containing comprehensive remedial measures but no private right of action. The Court stated that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to preclude the remedy of suits under § 1983." Id. at 20, 101 S.Ct. at 2626. Middlesex County may not logically preclude a section 1983 action

for violation of the EAHCA; because the EAHCA expressly recognizes a private right of action, rather than denying one as did the federal pollution statutes in Middlesex County, the inference is weaker that Congress intended to preclude suit altogether under section 1983. However, Middlesex County does support the more general proposition that when a statute creates a comprehensive remedial scheme, intentional "omissions" from that scheme should not be supplanted by the remedial apparatus of section 1983. Here, the EAHCA provides an express private right of action, but it omits entirely any provision for attorneys' fees. This omission is just as significant a part of the remedial scheme of the EAHCA as was the lack of a private right of action under the pollution statutes in Middlesex County, and the omission has the same preclusive effect with regard to section 1988 that the lack of a private remedy in Middlesex County had with regard

to section 1983.

This principle precludes section 1988 fees for the constitutional claims at issue here. The fact that the section 1983 claims alleged here are based upon independent constitutional violations rather than violations of the EAHCA itself is immaterial. The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to Thomas because of his handicap, are factually identical to the EAHCA claims. Indeed, in enacting the EAHCA Congress sought to ensure that handicapped children receive the very "rights" that plaintiffs claimed were constitutional under section 1983. See S.Rep. No. 168, 94th Cong., 1st Sess. 6-7, reprinted in 1975 U.S.Code Cong. & Ad.News 1425, 1430-31 (legislation said to be designed to enable states to fulfill their constitutional obligations to handicapped children). Thus, the only difference between the statutory and consti-

tutional claims is that the former carries with it a far more favorable legal standard for the plaintiffs and enabled them to prevail on what would otherwise have been fairly questionable claims. Because Congress, in providing statutory remedies for the same factual complaints, did not authorize attorneys' fees for such actions, we do not believe that section 1988 is a sufficient basis for the granting of attorneys' fees here. Plaintiffs' mere recitation of a section 1983 claim cannot create a right to attorneys' fees in litigation as to which Congress, perhaps recognizing the shortness of school funds, has not seen fit to make a special award. Cf. Scruggs v. Campbell, 630 F.2d 237 (4th Cir. 1980) (plaintiffs cannot evade EAHCA's exhaustion requirements merely by reciting section 1983 in their complaint). If this were not so, attorneys' fees would become available in almost every case by the mere incantation of section 1983. See

Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Statutory Grounds, 130 U.Pa.L.Rev. 488, 518 (1981).

This is not to say that the EAHCA in any way limits the substantive scope of a handicapped child's constitutional rights. Should a handicapped child have a constitutional claim that is not provided for by the EAHCA, section 1983 and therefore section 1988 might be available.[3] We hold only that where, as here, the constitutional allegations arise from the same factual underpinnings as the statutory claims, section 1988 does not apply.

B. The Rehabilitation Act

This district court also found that attor-

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3. To the extent plaintiffs' securing of a preliminary injunction fell outside any relief available under EAHCA, the attorneys' fees relative thereto might be reimbursable on such a theory. See Hymes v. Harnett County Board of Education, 664 F.2d at 410. We need not decide this question, however, because plaintiffs received attorneys' fees from the Cumberland School Committee for the work done obtaining the preliminary injunction, and those fees are not on appeal.

neys' fees were available under section 505 of the Rehabilitation Act, 29 U.S.C. § 794a(b). As with section 1988, attorneys' fees are available under section 794a(b) whenever a party presents a substantial section 504 claim even if they do not ultimately prevail under that claim. United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir.1980). The question before us, therefore, is whether section 504 created a substantial claim in this case.

The existence of any private action under section 504 is in doubt. Several circuits have implied such a right, e.g., United Handicapped Federation v. Andre, 622 F.2d 342; Coleman v. Darden, 595 F.2d 533, 538 (10th Cir.) cert. denied, 444 U.S. 927, 100 S.Ct.267, 62 L.Ed.2d 184 (1979); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir.1977), but recent Supreme Court dicta suggests otherwise. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 27, 101 S.Ct. 1531, 1545, 67 L.Ed.2d

694 (1981). We need not resolve the question, however. Even if there is generally a private right of action under section 504, we hold that attorneys' fees are unavailable here under the accompanying fees provision. 29 U.S.C. § 794a(b).

We reach this conclusion for substantially the same reasons that we reject an attorneys' fees award under section 1988. Section 504 of the Rehabilitation Act is a general prohibition of discrimination against otherwise qualified handicapped individuals in federally funded programs.[4] It does not

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4. Section 504 states:

No other qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation,

[footnote continued on next page]

specifically apply to the education of handicapped children.[5] The EAHCA, in contrast, is a comprehensive act specifically providing substantive and procedural rights for handicapped children denied an appropirate public education. While the more specific rights created by the EAHCA may not indicate a congressional intent to preclude "overlapping" actions under section 504, the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act. See page 8, supra. This result is particularly appropriate where the very

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[footnote continued from previous page]

Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulations shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee.

5. Regulations promulgated under section 504 by the Secretary of Education require school boards to provide handicapped children with a free appropriate public education. 34 C.F.R. 104.34. Compliance with the EAHCA is deemed to satisfy the Rehabilitation Act regulation.

existence of a private right of action under section 504 is the subject of doubt. But see Department of Education v. Katherine D., 531 F.Supp. 517; Mattie T. v. Holladay, 522 F.Supp. 72 (N.D.Miss.1981); Campbell v. Talladega County Board of Education, 518 F.Supp. 47 (N.D.Ala.1981); Tatro v. Texas, 516 F.Supp. 968.

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR., et als | : | |
| | : | |
| -vs- | : | C.A. NO. 76-0510 |
| | : | |
| CUMBERLAND SCHOOL COMMITTEE, et als | : | |

O R D E R

This matter came before the Court on Plaintiffs' Motion For An Award Of Fees And Other Costs. After hearing on April 30, 1982, based upon the Court's oral decision, as modified by order of June 5, 1982,

IT IS HEREBY FURTHER ORDERED;

1. Said motion shall be and hereby is granted.

2. The defendants, Rhode Island Commissioner and Associate Rhode Island Commissioner of Education, shall pay to plaintiffs' counsel, George M. Prescott, Esquire a fee of $32,109.00, plus costs of $293.93.

By Order: /s/
Deputy Clerk

Enter: /s/ Raymond J. Pettine
Chief Judge

June 11, 1982

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR., et al. | ) | |
| | ) | |
| v. | ) | Civil Action |
| | ) | No. 76-0510 P |
| CUMBERLAND SCHOOL COMMITTEE, et al. | ) | |

ORDER

On April 30, 1982 following the presentation of evidence, the Court rendered an extemporaneous oral decision in the above-captioned case. This decision was conditioned on counsel ordering a transcript and correcting errors I might have made as to the computation of costs, attorneys' fees, and/or the travel of the case. Counsel have complied as evidenced by the letter and transcript attached hereto and made a part hereof.

In keeping with the corrections mutually agreed upon by the parties, it is hereby ordered that the decision be amended accordingly. In the interest of having a single document

clearly setting forth the ruling of the Court, counsel will prepare a final order for entry by the Court.

By Order,

/s/
Deputy Clerk

Enter:

/s/ Raymond J. Pettine
Chief Judge

June 5, 1982

LAW OFFICES
OSTER, GROFF & PRESCOTT
936 SMITHFIELD AVENUE
LINCOLN, RHODE ISLAND
02865

May 26, 1982

Chief District Judge
Raymond J. Pettine
Chambers
Room 209
Federal Building
United States Courthouse
Providence, Rhode Island 02903

Re: Thomas F. Smith, Jr., et als, vs.
Cumberland School Committee, et als
US District Court
C.A. #76-0510

Dear Judge Pettine:

Forrest Avila, Esquire, counsel for the R.I. Commissioner and Associate R.I. Commissioner of Education ("the state party defendants") and I have conferred regarding the transcript of your decision on plaintiffs' motion to tax costs, including attorneys' fees.

We agree the decision should be modified as follows:

1. The court omitted to tax costs, other than counsel fees, pursuant to 28 USC § 1920. The correct amount of these costs, as set forth in the affidavit attached to plaintiffs' motion is $293.93.

2. The court erroneously deducted 11.5 hours. (See page 16 of the transcript). These hours are included in the 114

hours already deducted as having been compensated for by the defendant school committee.

3. There are some inaccuracies in the court's decision regarding the travel of the case. Mr. Avila and I agree the statement enclosed herewith is an accurate statement of the travel of the case.

The court should modify its award against the state party defendants to add;

1. $293.93 in taxable costs, pursuant to 28 USC § 1920.

2. $885.50 compensation for the 11.5 hours erroneously omitted ($70.00 per hour plus 10% incentive award).

Therefore, the award should be;

| | |
|---|---|
| $31,223.50 | (Transcript Page 17) |
| 885.50 | (Omitted hours) |
| 293.93 | (Taxable costs) |
| $32,402.93 | Total |

Very truly yours,
OSTER, GROFF & PRESCOTT

/s/
GEORGE M. PRESCOTT

c.c. Forest Avila, Esquire

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR., et als | : | |
| | : | |
| -vs- | : | C.A. #76-0510 |
| | : | |
| CUMBERLAND SCHOOL COMMITTEE, et als | : | |

TRAVEL OF CASE

Plaintiffs filed this civil action against the defendant school committee on November 26, 1976. The court issued a temporary restraining order requiring the defendant school committee to maintain the minor plaintiff in an educational program at Emma Pendleton Bradley Hospital, in East Providence. This order was continued on December 22, 1976 by a preliminary injunction. The minor plaintiff's interests were thereby protected by the court pending exhaustion of state administrative remedies.

An administrative hearing was held before the defendant school committee on January 20, 1977. From an adverse decision by the school committee the plaintiffs appealed to the defendant, Rhode Island Commissioner of Education.

An administrative hearing was held before the defendant, Associate Rhode Island Commissioner of Education on November 2, 21 and December 21, 1977.

On April 27, 1978 plaintiffs moved the court to amend their complaint to add the Rhode Island Commissioner and Associate Rhode Island Commissioner of Education as parties defendant. Their motion was granted on May 9, 1978 and these new defendants were served with an amended complaint.

This court certified two (2) questions of law to the Rhode Island Supreme Court on January 16, 1979. The state Supreme Court answered these questions in a written opinion dated June 3, 1980. Plaintiffs on June 9, 1980 again move the court to amend their complaint. The motion was granted on June 24, 1981 and all defendants were then served with a second amended complaint.

A declaratory judgment was entered by the court on June 4, 1981. From this judgment

the state defendants appealed to the First Circuit Court of Appeals. Their appeal was denied on January 11, 1982.

Pending the appeal plaintiffs' counsel's motion for taxation of costs, including attorneys' fees was staid.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR., et al | ) | |
| | ) | |
| v. | ) | C.A. No. 76-0510 |
| | ) | |
| CUMBERLAND SCHOOL COMMITTEE, et als | ) | |

Transcript of Court's Decision in the above captioned case on Friday, April 30, 1982.

APPEARANCES:

GEORGE M. PRESCOTT, Esquire.....FOR THE PLAINTIFFS

FORREST L. AVILA, Esquire
Department of Education
State of Rhode Island.....FOR THE DEFENDANTS

[2]

FRIDAY, APRIL 30, 1982

(Court convened 3:15 p.m.)

OPINION

THE COURT: Gentlemen, I don't know whether I like this idea of being under the

pressure of getting an opinion out in two and a half hours but I did finish this one. I just feel required to do this because of the number of these that I have and how they pile up. In advance I apologize for any poor construction, it was done as you know in a matter of a couple of hours and I don't know whether my calculations are that accurate, if so we can go over them together right here in the courtroom. At any rate, as I see the case it's as follows: Smith v. Cumberland School Committee, 76-0510.

As I stated in my memorandum and order, Smith v. Cumberland School Committee, Civil Action 76-0510, dated June 3, 1981, the facts of this "seemingly interminable case have been set out in prior opinions of this court, See opinion issued December 22, 1978 and the Supreme Court of Rhode Island, R.I., 415 Atlantic 2d 168 (1980), they need not be repeated here."

A sketchy skeletal outline of the travel of this case starts with a suit brought in this court seeking an injunction prohibiting the

Rhode Island Commissioner of Education from hearing administrative appeals under 20 United

[3]

States Code, Section 1415(c) and a declaration that the local School Committee, not the State Department of Mental Health, was responsible for paying for the special education of the handicapped plaintiff child under state law.

On January 17, 1977, I issued a preliminary injunction directing that the plaintiff child be maintained in a day program at Emma Pendleton Bradley Hospital at defendant's expense and that the plaintiff exhaust his state administrative remedies.

On December 22, 1978, I certified certain state law questions to the Rhode Island Supreme Court and decided the federal law question in defendant's favor.

The procedural requirements of the various stages of hearings and appeals as set forth in 20 USC, Section 1415 were followed. The plaintiff's appeals were unsuccessful and

there was this ultimate suit in this court. There was a substantial predeterminate period before the state court rendered its opinion. The state court determined that the local school committee was responsible for plaintiff's special education, thus overturning a contrary administrative decision by the Commissioner, 415 Atlantic 2d, 168 (R.I. 180). As a matter of state law the plaintiff won all that he originally sought. The federal claims (violations of procedural process, equal protection claim under rehabilitation act and inconsistency of the state's

[4]

funding of handicapped children with the Federal Handicapped Act) became moot. See unpublished opinion 1st Circuit January 11, 1982, No. 81-1454 and 81-1499, Smith v. Cumberland School Committee.

The complaint in this action was brought under the Constitution and laws of the United States, more specifically, the due process and

equal protection clauses of the 14th Amendment to the Constitution of the United States, the Education of the Handicapped Act (20 USC, Section 1401 et seq.), and the Rehabilitation Act of 1973, Section 504 (29 USC, Section 794). Count 2 of the amended complaint reads: The School Committee has discriminated against Tommy because he has a particular handicapping condition, that is, emotional disturbance, whereas it has not discriminated against other children with different handicaps. Such discrimination violates the equal protection clause of Section 1 of the 14th Amendment to the United States Constitution and 29 U.S.C., Section 794.

The plaintiff now moves for an award of attorney's fees and costs, 42 United States Code, Section 1988. By agreement the Cumberland School Committee has already paid the plaintiff $8,000 for 114 hours at $70 an hour; these hours represent the time spent getting the injunction and the hearings before the

School Committee. It should be noted that the state defendants were not

[5]

parties when the complaint was first filed.

The defendants claim they are not liable for any fees; they raise a number of objections, namely, they object to affidavits being used in the trial of this hearing claiming instead that the time, original time slip sheet should produced, object to a fee award with reference to proceedings before the Commissioner of Education was named a party to this action and object to a fee award for any hours spent before the Commissioner in administrative hearing. They also object to hours for that part of the case challenging the use of employees as hearing officers. Further objections are as to hours spent in conferences or otherwise with the Cumberland School Committee. The defendants also contend that since Cumberland has already paid a fee the plaintiff should not be paid any further

fee but if the court sees fit to award one, the hours for which they have been paid should be deducted; and finally that no fee should be paid since this is a proceeding under the Education to All Handicapped Children's Act which does not permit such an award.

The first objection is without merit. The affidavits introduced were testified to by the plaintiff's attorney who prepared them as being verbatim accounts of the entries he made on his time sheet which he cannot now locate. In other words, the entries in the affidavit are

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exact duplicates of the time sheet entries and are therefore admissible under the federal rules of evidence.

Objections 2 and 3 pertain to those hours spent in the state administrative process both before and after the State Commission of Education was named a party in this federal action.

I do not agree with the defendants. Exhaustion of state administrative proceedings was necessary before the plaintiffs could litigate their statutory and constitutional claims in this court.

As I said in Turillo v. Tyson, Civil Action 81-0356, slip opinion 3/29/82 at pages 9 and 13, plaintiffs were required to exhaust their Educational All Handicapped Children's Act remedies before bringing their Section 1983 action or claims under the Rehabilitation Act, Section 504.

Because these proceedings were necessary to their federal action and because the plaintiffs ultimately prevailed, this court finds fees are available against the state for these administrative proceedings.

Objection 4 I agree with the defendants, the plaintiff is not entitled to compensation for hours spent challenging use of employees as hearing officers. He has allocated 17 hours for this work.

Objections 5 and 6. These objections present no problem for fees for such work are not being claimed.

[7]

Cumberland has paid $8,000 to the plaintiff for 114 hours which includes the time in objection 5.

Objection 7. The defendant claims no fee should be paid because this is an action pursuant to the Education of All Handicapped Children's Act.

The defendant, however, gives little significance to the plaintiff's allegation of discriminatory treatment in violation of the equal protection clause and the second amended complaint and of the 42 United States Code 1983 claim.

The reasoning set forth in my recent opinion of Turillo v. Tyson, supra, plainly controls this case, entitle plaintiff to fees for time spent in both administrative process and for the litigation before the Rhode Island

Supreme Court as to the question this court certified to it.

The court excerpts the pertinent portions of Turillo: "Because exhaustion of these EAHCA administrative remedies is essential if plaintiffs are to prevail on their constitutional claim, work done in connection with these proceedings is compensable under Section 1988. Support for this conclusion is provided by New York Gaslight Club v. Carey, 447 U.S. 54 (1980). The Carey Court held that attorney's fees are awardable for work done in connection with state administrative proceedings mandated by Title 7

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of the Civil Rights Act of 1964. The court reasons that because initial resort to state proceedings was required by the statute, 'only authorization of fee awards insures incorporation of state proceedures as a meaningful part of the Title 7 enforcement scheme.' Significantly, fees were awardable in connection with

'any action or proceeding under' Title 7. 42 USC, Section 2000e-5(k). The court concluded that Title 7 authorized a plaintiff to bring an action for attorney's fees even if she prevailed on all claims in the state administrative proceedings.

Recently, the Court of Appeals for the Ninth Circuit applied the Carey holding to the 1983 section. In Bartholomeu v. Watson, 65 F. 2d 910 (Ninth Cir. 1982), the court held that Section 1988 attorney's fees were awardable for work performed in state court on state law claims when the state court action was resorted to as a result of Pullman abstention. The EAHCA proceedings here are just as much a part of plaintiffs' Section 1983 claim as was the state court action a part of the Section 1983 in Bartholomeu. Research has produced only three decisions on whether work performed in connection with EAHCA administrative hearings is compensable under Section 1988. All three courts awarded fees.

Department of Education v. Katherine D., Civil Action No. 80-0582 (D. Hawaii Jan. 28, 1982); Patsel v. District of Columbia Board of Education, C.A. No. 81-2126

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(D. D.C. Jan. 21, 1982); Hilden v. Evans, 3 EHLR 552: 299 (D. Ore. 1980)." Turillo v. Tyson, supra, at 10 and 11. The Bartholomeu case, cited in the excerpt from Turillo, is squarely on point as to entitlement to fees for litigation of the question certified by this court; Bartholomeu involved abstention, which is conceptually similar to the certification of questions of state law.

Now, the hourly rate. I left a page downstairs, gentlemen, as to where I was to read, I'm going to have to go back and insert that page. That page goes where I said objection number 7, the defendant claims no fees should be paid because this is an action pursuant to the EAHCA. I then said the defendant, however, gives little significance to

the plaintiff's allegation of discriminatory treatment in violation of the equal protection claim and the second amended complaint and of the 42 United States Code, Section 1983 claim. I want to add there I find that the equal protection claim is colorable and non-frivolous. Be that as it may, enough has been said to establish that the plaintiffs have made a substantial constitutional claim even if that claim ultimately would not have prevailed. Plaintiffs are therefore entitled to attorney's fees to the extent they have prevailed in an action or proceeding to enforce their 1983 claim. 42 U.S.C. Section 1988. Plaintiffs are certainly entitled to fees for work performed

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in connection with the state administrative proceedings required by the EAHCA and in litigation before the Rhode Island Supreme Court. And I refer you to Turillo at page 9. Now to carry on from where I was: Hourly rate.

Counsel have left to the court the determination of a reasonable hourly rate. The plaintiff accepted $70 an hour from the Town of Cumberland. I see no reason why he should expect anything more here. I find this is a fair rate considering the nature of the case. It has been a long, hard, tortuous one; the issue was precedent setting and not the easiest to litigate. However, I must find a lodestar as I said in Kennelly v. Lemoi et al, C.A. No. 76-0784, November 20, 1981, "To further assist the trial courts, the First Circuit in Furtado v. Bishop, 635 F. 2d 915 (First Cir. 1980), adopted the approach developed by the Third Circuit in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F. 2d 102 (3rd Cir. 1976), more recently endorsed and applied in Copeland v. Marshall, No. 77-1351 (D.C. Cir. 1980) (en banc). See also Copper Liquor, Inc. v. Adolph Coors Co., 624 F. 2d 575, 583, note 15 (5th Cir. 1980). 'This approach recognizes that commenting on

the twelve factors identified in Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974) setting out the factors adopted in Greenblatt, supra, may not in any real sense contribute to the rational setting of

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a fee; the comments are imprecise and the items overlap." Furtado v. Bishop, supra, at 920. However, Furtado does not abrogate the twelve factors in Greenblatt. Rather, it gives the trial judges the help that will assist them in honing the Greenblatt factors into "a useful analytical framework that can be applied by trial courts in all cases and can also lend itself to meaningful review...." Id. at 920. The succinct recitation by the First Circuit of this theory warrants that it be quoted in full rather than capsulized. It reads: "The starting point is to calculate the lodestar": "The number of hours reasonably expended multiplied by a reasonable hourly rate." This would involve separating out

work done in relation to a firm's hierarchy, from senior partner to junior associate (and, we would add, including work that was or ought to have been assigned to a non-lawyer); eliminating time beyond that consistent with a standard of reasonable efficiency and productivity; and, after receiving documentation and possibly holding a hearing, assigning appropriately hourly rates for the kind of work done by those at different levels of expertise. This results in a lodestar fee that then is adjusted upward or downward to reflect the contingent nature of any fee (if such is not reflected in the hourly rate), delay in payment, quality of representation (i.e. an unusually good or poor performance above or below the skill already

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reflected in the hourly rates), exceptional (and unexpected) results obtained."

Furtado's two-part analysis preserves the twelve factors in Greenblatt, but puts

them in a logical framework and orderly sequence. Some of the Greenblatt criteria are relevant to determining the lodestar, the number of hours reasonably expended multiplied by a reasonable hourly rate. These criteria include, the time and labor required, the experience and ability of the attorney, the customary fee in the community, awards in similar cases, and the novelty and difficulty of the questions presented. Other criteria are relevant to adjusting the lodestar up or down, the second half of the Furtado analysis. These factors include: preclusion of other employment, whether the fee was fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the undesirability of the case, and the nature and length of the professional relationship.

Guided by the relevant Greenblatt criteria, the court will first determine the lodestar figure. Because plaintiff's counsel

was a one-man operation," and I say that that is virtually true in this case because Mr. Prescott testified that he alone worked on this case, "the language in Furtado ralating to a firm hierarchy is

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inapplicable here. Furthermore, it is undisputed that the time expended was consistent with a standard of reasonable efficiency and productivity. Therefore, Furtado does not require this court to eliminate any excessive hours spent.

The next inquiry in determining the lodestar is whether the questions presented were particularly novel or difficult." I think that they were. The issue determined set a precedent which prior thereto was uncertain. Resolution of the question involved, at the minimum, an interpretation of a convoluted state statutory scheme and its juxtaposition to the federal law. Although awards in similar cases would be an indictia

looked to as to a reasonable fee I have no such information here.

Another lodestar criterion, borrowed from Greenblatt, is skill required to perform the legal services properly. The issue is complicated and required more than average legal ability. Mr. Prescott performed his task well as is evidenced in part by the results he achieved.

The court must now complete the second half of the Furtado analysis by determining whether the lodestar rate should be adjusted up or down.

First, the Greenblatt criterion of preclusion of other employment can affect the lodestar rate only if the hours spent on the case inherently precluded counsel

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from representation of certain other clients. However, the hours expended in this case were not so unusual as to require special consideration. In this case there were no unusual or

significant time limitations.

Another Greenblatt factor that may require adjustment of the lodestar is the nature and length of the professional relationship with the client. However, I see nothing to be considered here.

The next relevant criterion is the amount involved and the results obtained. I have already commented on the results. As to the amount involved, that is not relevant to this case since no damages were sought.

The factor of undersirability of the case, however, does not have a favorable effect on the lodestar figure. There was no particular publicity engendering any great public reaction. If anything, there is public support for this kind of action.

Next I must consider whether the case was litigated on a fixed or contingent fee basis. This case was, with the exception of $400, a contingent fee case. As I stated in Palmigiano, supra, at 737, "Certainly the contingency factor

is cause for a more liberal application of the consideration guiding a court in awarding a fee; Congress intended, through the fees award act, to encourage civil rights litigation to vindicate important rights

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guaranteed by law."

In summary I have said that this was a difficult case requiring more than average skill; I also stated that the contingency factor weighs on the side of a more liberal award. In short I feel some modest upward adjustment should be made, I think 10 percent is fair.

The fee. This is a calculation which you better follow. I'd like to interrupt by saying here, gentlemen, that this opinion I'm going to, as I'm reading it, and it's strange you keep writing at top speed and then as you read it it sounds somewhat different, I mean the essence, the meaning, what I want to say is there but the essence of it isn't quite as

clear I think as it should have been, what I want to say to you is some long while ago I got the idea of from time to time issuing what is called a tentative opinion and submitting it to the parties so that they can look that opinion over and make any comments they want with reference to the facts before it's ultimately filed and so I'm going to label this as a tentative opinion and permit you to come in, and indeed invite from you your comments, corrections, modifications or shall I say the smoother flowing of the facts and history of this case and also any of the computations that I might make on this fee award, and I notice there's one page missing.

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(Pause)

Are you going to order a transcript of this?

MR. AVILA: Yes, Your Honor.

THE COURT: Are you, Mr. Prescott?

MR. PRESCOTT: I will, Your Honor.

THE COURT: All right, you've got an order from both of them and I'd like to have this as soon as you can.

All right, the computation, the fee. As I see it the total hours in the affidavit as I see it are 564.25 hours. From this we must deduct 114 hours paid by Cumberland. I am not entirely clear because there were certain hours disallowed, these hours that were disallowed amounted to 11.5 hours, that was 11/26/76, 12/14/76, 12/14/76, and 12/15/76. I don't know if these 114 hours include those hours or whether this 11.5 hours were in addition to the 114 hours and that you are seeking compensation for those also. This is why I say you better check this computation afterwards when you get this transcript so you can straighten me out on this.

Hours for work that could have been done by paralegals; I find that those total 35 hours, and I'll read those to you and you can check them later. 5/10/78-3.25, 10/7/78-2,

10/10/78-2.25 hours, 10/12/78-2, 10/16/78-1.50, 6/13/79-1.50, 6/9/80-1.50, 9/12/80-2, 9/16/80-2, 12/15/80-2 hours,

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2/25/81-2, 3/23/81-1.25, 4/23/81-.75, 5/19/81-2, 10/23/79-2.50, 10/30/79-1.25, 11/2/79-2.25, 3/8/79-1.50, 3/31/77-1.50. Now those I compute as equaling 35 hours. And then there are also hours disallowed for conferences with the defendant School Committee and I compute those as 13.25 hours, those being 12/17/80, 12/22/80, 12/31/80, 1/2/81, 1/5/81, 1/7/81, 2/21/81, 2/23/81, 2/24/81, 2/25/8. With that determination behind me I then find hours to be paid at $70 an hour would equal 450.25 minus 11.50 hours that I have already told you about, that being the hours disallowed because they are included in the 114 hours attributed to Cumberland. My problem there is I don't know if I'm deducting them twice or not, and that's the thing that has to be straightened out. The 35 hours for work that could have been done by paralegals, and 13.25

hours for conferences with the School Committee. That then leaves 390.50 hours. 390.50 hours at $70 an hour equals $27,335. Plus 35 hours of paralegal work at the rate of $30 an hour equals $1,050. The total award then would be $28,380, $28,385, plus a 10 percent incentive award of $2,838.50 making a total award of $31,223.50. So gentlemen, that is my tentative opinion in this case. When you receive the transcript of this case I would ask that you pay particular attention to my recitation of the travel of the case and I would like that worked on by both sides so

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that it truly reflects what the travel of this case was, more especially as it pertains to the time of the administrative proceedings and the work done in the administrative proceedings. You will note that I have stated that on January 17th I issued a preliminary injunction directing that the plaintiff child be maintained in a day program, Emma Pendleton Bradley Hospital

at the defendant's expense. There's no question about that, that's what I did and I did it on that date. And I want to check out the record to see if I also ordered at that time that the plaintiff exhaust his state administrative remedies. I think the plaintiff contends that I did order that at the same time, is that correct, Mr. Prescott?

MR. PRESCOTT: It's in your decision but not in the injunction. The injunction says that he's protected while he exhausts administrative remedies and the decision says that's what we should do.

THE COURT: The basic finding then was that he did exhaust his administrative remedies.

MR. PRESCOTT: They had to do that.

THE COURT: Yes, then I certified state law question, then I said the procedural requirements for the various stages of hearings and appeals were followed. I think that followed after that original preliminary injunction.

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MR. PRESCOTT: And after the exhaustion of the remedies.

THE COURT: Yes, but I mean it all started after the injunction, after you came to see me on preliminary injunction.

MR. PRESCOTT: The questions were not certified for almost two years.

THE COURT: No, I don't mean the certification. I mean the state administrative proceedings remedies followed my preliminary injunction.

MR. PRESCOTT: They did entirely.

THE COURT: Am I correct?

MR. PRESCOTT: That's correct.

THE COURT: They were not before, they were following.

MR. PRESCOTT: They followed, that's correct, Judge.

THE COURT: Now what I don't understand, I have a notation that all your appeals were unsuccessful and there was an ultimate filing

of the suit in this court. That's not correct because the suit had already been filed in this court.

MR. PRESCOTT: That's correct, the original complaint was amended to add the state parties as defendants.

THE COURT: That has to be, the plaintiff's

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appeals were unsuccessful and ultimately the complaint in this court was amended. I think that has to be corrected to that effect. That travel has to be ironed out and I'll expect you gentlemen to iron it out. It does not eat at the heart of the opinion at all but it does have to be ironed out and I'll expect you to iron it out and I especially charge you, Mr. Prescott, with doing that.

(Whereupon proceedings concluded.)

No. 82-2120

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS F. SMITH, JR., et al.,

*Petitioners,*

—v.—

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,

*Respondents.*

## SUPPLEMENTAL BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## STATEMENT

Subsequent to the filing of our Petition, yet another court of appeals' decision has been rendered specifically addressing one of the much-litigated issues presented for review in our Petition. Espino v. Besteiro, 708 F.2d 1002, 1006-10 (5th Cir. 1983). In order to bring this decision to the attention of this Court, we hereby file this Supplemental Brief pursuant to Rule 22.6 of the Rules of this Court.

## REASONS FOR GRANTING THE WRIT

In our Petition at 7-20, we pointed out that the First Circuit's decision denying all fees in this case under the Fees Act, 42 U.S.C. § 1988 as amended, was contrary to the express intent of Congress as set forth in H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.7 (1976); was contrary to this Court's decision in Maher v. Gagne, 448 U.S. 122, 128 n.10, 132 & n.15 (1980); and was contrary to four courts of appeals' decisions which specifically

addressed the first issue presented here: Monahan v. Nebraska, 687 F.2d 1164, 1172 (8th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); Robert M. v. Benton, 671 F.2d 1104, 1106 (8th Cir. 1982); Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir. 1982); Hastings v. Maine-Endwell Central School District, 676 F.2d 893, 897 (2d Cir. 1982).

Subsequent to the filing of our Petition, the Fifth Circuit, in Espino v. Besteiro, 708 F.2d 1002, 1006-10 (5th Cir. 1983), not only found the foregoing authority to be controlling, but also expressly rejected the reasoning used and the conclusion reached by the First Circuit in the Smith case, the case under review here.

In Espino, as here, plaintiffs asserted constitutional claims, a Rehabilitation Act claim, and a claim under the Education for All Handicapped Children Act; plaintiffs prevailed by obtaining the relief sought although the constitutional and Rehabilitation Act

claims were never addressed on the merits; and plaintiffs thereafter filed for attorneys fees under the Fees Act, 42 U.S.C. § 1988, and under the fee provision of the Rehabilitation Act, 29 U.S.C. § 794a(b).

The Fifth Circuit in Espino held that plaintiffs were entitled to fees under the Fees Act.[1/] In the Fifth Circuit's view, this conclusion was compelled by Congress' intent as set forth in the House Report, and was further compelled by this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980). See Espino, 708 F.2d at 1007-08. The Fifth Circuit also relied on the courts of appeals' decisions rendered on this frequently litigated issue, see Espino, 708 F.2d at 1008; and the Fifth Circuit analyzed and rejected the decision reached by the First Circuit here: "We reject

1. In view of its decision under the Fees Act, the Fifth Circuit did "not reach the question whether fees should have been awarded under § 794a(b) [of the Rehabilitation Act]." Espino v. Besteiro, 708 F.2d 1002, 1003 (5th Cir. 1983). The Fifth Circuit in Espino accordingly did not address the second issue presented for review in our Petition for a Writ of Certiorari at ii, 20-25.

the First Circuit's reasoning in Smith," see Espino, 708 F.2d at 1009.

## CONCLUSION

For the reasons set forth in our Petition and in this Supplemental Brief, the Petition for a Writ of Certiorari should be granted, and the decision of the First Circuit should be summarily reversed.

Dated: October 5, 1983

Respectfully submitted,

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—v.—

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*Respondents.*

## JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED JUNE 22, 1983**
**CERTIORARI GRANTED OCTOBER 31, 1983**

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| State Defendants' Response to Plaintiffs' Motion for Filing the Administrative Record. | Aug. 23, 1978 |
| Order Directing the Filing of the Administrative Record, and Establishing a Briefing Schedule. | Oct. 3, 1978 |
| State Defendants' Motion to Certify a Question of State Law to the Rhode Island Supreme Court. | Oct. 30, 1978 |
| Opinion Certifying Two Questions to the Supreme Court of Rhode Island. | Dec. 22, 1978 |

Order of Certification Submitting Certain Questions of State Law to the Honorable Supreme Court of the State of Rhode Island for Determination. Jan. 16, 1979

Plaintiffs' Motion to Modify the Preliminary Injunction By Requiring Defendants to Maintain Plaintiff Thomas F. Smith III in the Special Education Program at Harmony Hill School. June 13, 1979

Order Modifying the Preliminary Injunction to Require Defendants to Maintain Plaintiff Thomas F. Smith III in the Special Education Program at Harmony Hill School. July 10, 1979

SUPREME COURT OF RHODE ISLAND, NO. 79-22-APPEAL

Opinion Answering Certified Questions Affirmatively in Favor of Plaintiffs. June 3, 1980

U.S. DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, C.A. NO. 76-0510

Plaintiffs' Motion to Amend and Supplement the

Pleadings, and for Leave to File an Amended and Supplemental Complaint. June 9, 1980

Order Granting Plaintiffs' Motion for Leave to File an Amended and Supplemental Complaint. June 24, 1980

Second Amended and Supplemental Complaint, with Exhibits A-E. Sept. 16, 1980

Answer of State Defendants William Robinson, Thomas Schmidt, and the Rhode Island Board of Regents for Education. Sept. 30, 1980

Order Closing the Case Excepting the Matter of Attorneys Fees. Dec. 9, 1980

Plaintiffs' Motion to Vacate the Order of December 9, 1980. Dec. 15, 1980

Order Setting Forth Findings of Fact, Declaration of Plaintiffs' Rights, Entry of Permanent Injunction, Approval of Partial Award of Attorneys Fees, and Recognition of Plaintiffs' Claims Against the State Defendants for Attorneys Fees. Jan. 12, 1981

Order Vacating the December 9, 1980 Order as to the State Defendants, and Establishing a Motion

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| Schedule. | Feb. 26, 1981 |
| Plaintiffs' Motion for Rendition of Decision and Entry of Judgment. | Mar. 23, 1981 |
| State Defendants' Motion to Dismiss for lack of a Cause of Action and on Grounds of Immunity. | Apr. 17, 1981 |
| Memorandum and Order Denying the State Defendants' Motion to Dismiss for Lack of a Cause of Action and on Grounds of Immunity. | June 4, 1981 |
| Order Declaring Plaintiffs' Rights as to the Entitlement of Plaintiff Thomas F. Smith III to a Free Appropriate Education Paid by Defendant Cumberland School District, and Setting the Time for Plaintiffs' Motion for an Award of Attorneys Fees. | June 4, 1981 |
| Plaintiffs' Motion for An Award of Fees and Other Costs. | June 23, 1981 |
| Affidavit of Plaintiffs' Lawyer in Support of Plaintiffs' Motion for an Award of Attorneys' Fees and Other Costs. | June 23, 1981 |
| Defendants' Objection to Plaintiffs Motion for Counsel fees. | June 30, 1981 |

Order Granting Defendants' Motion to Stay the Fee Proceedings. July 28, 1981

U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, APPEAL NOS. 81-1454 AND 81-1499

Opinion and Judgment Rejecting the State Defendants' Immunity Appeal, and Rejecting Plaintiffs' Appeal on Grounds of Mootness as Plaintiffs Had Won "All That [They] Originally Sought." Jan. 11, 1982

U.S. DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, C.A. 76-0510

Hearing on Plaintiffs' Motion for an Award of Fees and Costs. Apr. 30, 1982

Opinion (Oral Decision) From the Bench Awarding Attorneys Fees. Apr. 30, 1982

Order Amending the Fee Award, and Directing the Preparation of a Final Order. June 5, 1982

Final Order Directing the State Defendants to Pay Fees and Costs to Plaintiffs' Lawyer. June 11, 1982

U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, APPEAL NO. 82-1524

Opinion and Judgment Reversing the District Court's Award of Attorneys Fees. Mar. 24, 1983

U.S. SUPREME COURT, NO. 82-2120

Petition for a Writ of Certiorari. June 22, 1983

Order Granting the Writ of Certiorari. Oct. 31, 1983

## COMPLAINT (NOV. 26, 1976)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| THOMAS F. SMITH, JR., URSULA J. SMITH, Parents, Guardians and Next Friends of THOMAS F. SMITH, III, and THOMAS F. SMITH, III. | ) | |
| -vs- | ) | C.A. 76-0510 |
| WALTER CURTIN, LOUIS C. GOODRICH, JOSEPH L. JACINTO, LOUIS J. KOLODZIEJ, EDWARD P. MOUSSEAU, and WILLIAM J. O'COIN, JR., in their capacity as members of the School Committee of the Town of Cumberland | ) | |

C O M P L A I N T

1. This action arises under the Constitution and laws of the United States; more particularly, the Due Process Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983.

2. The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

3. This Court has jurisdiction pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(3).

4. Plaintiffs, THOMAS F. SMITH, JR. and URSULA J. SMITH are husband and wife, residents of Cumberland, Rhode Island and parents of THOMAS F. SMITH, III. THOMAS F. SMITH, III is an exceptional, multi-handicapped person, 8 years of age, and in need of special education services.

5. The defendants are the duly elected members of the School Committee of the Town of Cumberland.

6. Plaintiff, THOMAS F. SMITH, III, suffers from both physical and emotional handicaps and has a long history of being unable to fit into any educational environment provided by the defendant School Committee.

7. After repeated failures to find an appropriate educational placement the Defendant School Committee at the urging of the

plaintiffs, THOMAS F. SMITH, III's parents, agreed to place him in a day program for children afflicted with his particular handicap at Emma Pendleton Bradley Hospital, East Providence, Rhode Island.

8. Said placement was made December 6, 1975.

9. Plaintiff, THOMAS F. SMITH, III, received and benefited from the many services of the special program at Bradley Hospital in which he was enrolled. In fact, this program was and is the only educational program capable of meeting the said plaintiff's special needs.

10. The Defendant School Committee is charged by law with the responsibility to provide a suitable, appropriate education to handicapped persons such as the plaintiff, THOMAS F. SMITH, III.

11. While your plaintiff, THOMAS F. SMITH, III, was enrolled in the said program for the school year commencing September 8,

1976 the defendants have refused to continue funding of his placement in the program.

12. Defendants, acting under color of state law (Title 16 Ch. 24 - General Laws of Rhode Island) as agents of the State Board of Regents have caused or are about to cause, the termination of THOMAS F. SMITH, III's placement at Bradley Hospital by withdrawing their funding for same.

13. Defendants have notified the plaintiffs of the proposed change as required by Article IX - Procedural Safeguards of the Regulations - Education of Handicapped Children, adopted by the State Board of Regents pursuant to an agreement reached in the case of;

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| THE RHODE ISLAND SOCIETY FOR AUTISTIC CHILDREN, INC., et als | ) | c.a. |
| vs | ) | file |
| ROBERT RIESMAN, As Chairman of The Rhode Island State Board of Regents, et als | ) | no. 5081 |

now pending in this Court.

(A copy of Article IX - Procedural Safeguards is annexed hereto as "Exhibit A")

14. Plaintiffs have appealed the decision of the Superintendant of Schools, acting under color of state law and as agent for the defendants, dated November 5, 1976 (A copy of which is annexed hereto as Exhibit B) pursuant to Article IX - Procedural Safeguards. The force and effect of the said decision is to deny any further responsibility to fund THOMAS F. SMITH III's current placement at Emma Pendleton Bradley Hospital, which assuredly will result in his termination there.

15. Defendants failure to continue THOMAS F. SMITH's current placement until his appeal to the defendants, acting as the School Committee of the Town of Cumberland, can be heard and until all further proceedings pursuant to G.L. R.I. (1956) §16-39-1 et seq are completed is violative of plaintiffs' due process rights as guaranteed

by Section 1 of the Fourteenth Amendment to the Constitution of the United States, as embodied in Article IX - Procedural Safeguards - Section 4.0 Paragraph 4.1.

WHEREFORE, Plaintiffs pray for relief as follows:

1. That THOMAS F. SMITH, III be immediately reinstated in the program at Emma Pendleton Bradley Hospital at the expense of the defendants.

2. That THOMAS F. SMITH, III be maintained in said program during the pendency of any hearing conducted pursuant to Article IX - Procedural Safeguards of the Regulations - Education of Handicapped Children and Title 16 Chapter 39 of the General Laws of Rhode Island, at the expense of the defendants, and

3. For such other and further relief as may be just in the circumstances of this case.

By their attorneys
OSTER, ESPO, FAY & GROFF
936 Smithfield Avenue

Lincoln, Rhode Island 02865

/s/
GEORGE M. PRESCOTT

DATED: November 26, 1976

[Jurat omitted in printing.]

**EXHIBIT A TO THE COMPLAINT: REGULATIONS OF THE RHODE ISLAND BOARD OF REGENTS GOVERNING SPECIAL EDUCATION OF HANDICAPPED CHILDREN**

Regulations - Education of Handicapped Children (adopted December 19, 1963 and amended June 15, 1972) are hereby amended by adding IX to the first section entitled General Regulations of the Board of Regents Governing Special Education of Handicapped Children.

IX. Procedural Safeguards

1.0 LEA Responsibility

1.1 Each LEA shall establish and maintain procedures to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provisions of free appropriate education by such agency. Such procedures shall include but need not be limited to:

1.1.1 Written prior notice to the parent or guardian whenever the LEA proposes to initiate or change or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate education.

1.1.1.1 Such notice shall be sent by certified mail to the last known address of the parent.

1.1.1.2 It shall include a description of the action proposed and of the reason for such action and of the safeguards afforded to parents or guardians and the procedures by which they may avail themselves of these safeguards.

1.1.1.3 It shall include a form to be signed and returned by the parents giving consent or objecting to the proposed action by the LEA or requesting a conference with the Supervisor of Special Education to dis-

cuss the proposed action.

1.1.1.4 It shall inform the parents that no action will be initiated by the LEA without consent of a parent, but that failure to respond within ten school days will be deemed to be consent, and the action proposed will then be initiated by the LEA.

1.1.1.5 It shall contain specific information - name, address and telephone number - concerning the LEA staff person who will assist the parents in availing themselves of all safeguards, and shall be written, unless it is clearly not feasible to do

so, in the parents spoken language.

1.1.1.6 It shall inform the parents that all of the relevant records with respect to the identification, evaluation and placement of the child shall be made available for the parents to examine. It shall further inform the parents of their right to obtain (at their expense) an independent evaluation of the child and that a listing of all public and private agencies performing such evaluations will be provided by the school department upon request.

1.1.2 A procedure to protect the rights of the child whenever the parents or

guardians of the child are not known, unavailable or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State Education Agency or Local Education Agency which is involved in the education or care of the child) to act as surrogate for the parent or guardian.

1.1.3 An opportunity for a conference with the local Supervisor of Special Education no later than ten school days after the request.

1.1.3.1 Immediately following the conference, the Supervisor of Special Education shall submit a recommendation in writing to the Superintendent of Schools who shall review the recommendation and shall notify the parents of his decision within ten days after the conference.

1.1.4 An opportunity to appeal to the School Committee if the decision of the Superintendent is not acceptable to the parents.

1.1.4.1 Such appeal shall be submitted in writing within ten school days.

1.1.4.2 A hearing shall be held by the School Committee or its designated hearing officer and a decision shall be given not later than thirty days after the appeal.

1.1.4.3 A copy of the decision shall be mailed to the parents, together with a notice informing them of their right to and procedure for further appeal.

2.0 Procedures for Appeal from Decision of LEAs

2.1 A parent or guardian not satisfied with the decision of the School Committee may continue his appeal under provisions of Chapter 16-39 of the General Laws of Rhode Island, 1956, as Amended.

3.0 Rights Related to Hearings

3.1 Any party to any hearing pursuant to Sections 1.1.4 and 2.1 above shall be accorded:

3.1.1 The right to prior notice of the time and place of the hearing;

3.1.2 The right to be accompanied and represented by counsel and by individuals with appeal knowledge or training with respect to the problems of handicapped children;

3.1.3 The right to present evidence and confront and cross-examine witnesses;

3.1.4 The right to a written or electronic verbatim record of such hearings, at cost to the party;

3.1.5 The right to written findings of fact and decision.

4.0 Placement of Child During Pendency of Proceedings

4.1 During the pendency of any proceedings conducted pursuant to 1.0 and 2.0 above, unless the SEA or the LEA and the parents or guardians otherwise agree, the child shall remain in his/her current educational placement, or, if applying for initial admission to a public school, shall, with the consent of the parent or guardian, be placed in a regular class in the public school program until all such proceedings have been completed. The sole exception in either case shall be when the Superindent upon substantial evidence determines that the child will be an immediate danger to himself or to others. Any such decision may be contested through the proceedures in 1.0 and 2.0 above.

5.0 Procedure in the Event that Parents or Guardians Withold Consent

5.1 In the event that a parent or guardian withholds consent to change the identification, evaluation or educational placement of a child, the Supervisor of Special Education shall arrange a meeting with the parent or guardian as promptly as possible at a time and place convenient to the parent or guardian, at which the Supervisor of Special

Education shall explain the reason for the change. Not less than three distinct efforts shall be made by written or telephonic communication to arrange such meeting.

5.2 In the event that a parent or guardian, after receipt of notice of the time and place of the meeting, shall fail or refuse to attend, then the parent or guardian's withholding of consent shall be deemed insuffient and the change proposed shall be accomplished, provided the parent or guardian shall, thereupon, be notified in writing of the right to a conference and a hearing in accord with Sections 1.1.3 and 1.1.4 above.

6.0 Rights of Parents to a Hearing

6.1 Notwithstanding any time limits prescribed above, parents or guardians have the right to request a conference with the local Supervisor of Special Education at any time when they believe that a decision substantially altering the educational placement of their child has been made. If such conference does not result in a recommendation acceptable to the parents, the procedure provided by 1.1.4 may be initiated.

7.0 Effective Date

7.1 This Section shall become effective upon adoption by the Board of Regents for Education.

Effective Date: June 14, 1976

**EXHIBIT B TO THE COMPLAINT: LETTER DATED NOVEMBER 5, 1976 TO PLAINTIFFS' LAWYER FROM THE SUPERINTENDENT OF SCHOOLS STATING THAT THE EDUCATION OF PLAINTIFF THOMAS F. SMITH III WILL NO LONGER BE PAID BY THE CUMBERLAND SCHOOL COMMITTEE**

Town of Cumberland
Rhode Island

* * * * * *

SCHOOL DEPARTMENT
1512 MENDON ROAD - CUMBERLAND
02864

November 5, 1976

George M. Prescott, Esquire
936 Smithfield Avenue
Lincoln, Rhode Island 02865

Re: Thomas F. Smith III
6 Aurora Drive
Cumberland, Rhode Island 02864

Dear Mr. Prescott:

I am responding to your letter of October 21, 1976.

The Cumberland School Committee does not propose a change in placement for Thomas F. Smith III. The Committee believes that Emma Pendleton Bradley Hospital provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him.

Thomas is an emotionally disturbed child as defined in Section 40.1-7-4 of the General

Laws of Rhode Island, 1956, As Amended, and as such, by virtue of Chapter 7 of Title 40.1 of the General Laws, his education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals.

If you desire a hearing before the School Committee, will you please let me know in writing and I will notify you of the date of the hearing.

Very truly yours,

/s/
Robert G. Condon
Superintendent of Schools

RGC:ps

**TEMPORARY RESTRAINING ORDER: DEFENDANTS ENJOINED FROM TERMINATING THE PAYMENT FOR AND PLACEMENT OF PLAINTIFF THOMAS F. SMITH III IN A SPECIAL EDUCATION PROGRAM AT BRADLEY HOSPITAL (DEC. 9, 1976)**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

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| THOMAS F. SMITH, JR., et als. | ) | |
| | ) | |
| -vs- | : | C.A. No. |
| | ) | 76-0510 |
| WALTER CURTIN, et als. | ) | |

TEMPORARY RESTRAINING ORDER

Upon the verified Complaint filed herein and upon representations made by counsel during a preliminary hearing held on Plaintiffs' Motion For Preliminary Injunction and Temporary Restraining Order on December 8, 1976 at 4:30 P.M.; and it appearing therefrom that defendants unless restrained and enjoined forthwith may terminate the placement of the minor plaintiff herein,

Thomas F. Smith, III, in a special education program at Emma Pendleton Bradley Hospital, East Providence, Rhode Island; and it being manifest that any such termination would cause immediate and irreparable injury to said plaintiff and that such act would alter the status quo existing between plaintiffs and defendants before a hearing for a preliminary injunction could be held, therefore;

IT IS HEREBY ORDERED that defendants, acting as the School Committee of Cumberland, Rhode Island are temporarily restrained pursuant to Rule 65 of the Federal Rules of Civil Procedure from failing to maintain the minor plaintiff, Thomas F. Smith, III in the special education program in which he is now enrolled at Emma Pendleton Bradley Hospital, East Providence, Rhode Island until plaintiffs can be heard on their Motion For Preliminary Injunction.

Said Motion is hereby scheduled for hearing on December 20, 1976 at 3:00 P.M.

/s/ Raymond J. Pettine
Chief United States District Judge

DATED: December 9, 1976

**PRELIMINARY INJUNCTION: DEFENDANTS REQUIRED TO CONTINUE TO MAINTAIN AT THEIR EXPENSE THE SPECIAL EDUCATION PLACEMENT OF PLAINTIFF THOMAS F. SMITH III IN A SPECIAL EDUCATION PROGRAM AT BRADLEY HOSPITAL (DEC. 22, 1976)**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

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| THOMAS F. SMITH, JR., et als. | ) | |
| | ) | |
| -vs- | ) | C.A. NO. |
| | ) | 76-0510 |
| WALTER CURTIN, et als. | ) | |

PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiffs' motion for a preliminary injunction, and the court having considered the facts of this case as contained in the verified complaint and the stipulations of counsel for both parties made in open court, and it appearing to the court after due deliberation that the defendants are about to commit the acts set forth in the verified complaint, to the immediate and irreparable injury of the minor plaintiff, and the court having made its findings of fact and conclusions of law,

IT IS HEREBY ORDERED, that the minor plaintiff, Thomas F. Smith, III, shall be maintained at the Day Hospital Program at Emma Pendleton Bradley Hospitl, East Providence, Rhode Island at the expense of the defendants, acting as the School Committee of Cumberland, Rhode Island until a hearing which is currently scheduled for January 7, 1977 before the said school committee is held, and any and all appeals therefrom, allowed pursuant to Article IX - Procedural Safeguards of the Regulations Education of Handicapped Children of the Rhode Island Board of Regents and G.L.R.I. §16-39-1, et seq., are heard and determined.

This order is effective as of December 20, 1976 at 3:44 P.M.

/s/ Raymond J. Pettine
Chief United States District Judge

DATED: December 21, 1976

**MEMORANDUM AND OPINION: PRELIMINARY INJUNCTION CONTINUED SO AS TO REQUIRE ON-GOING PLACEMENT AT DEFENDANTS' EXPENSE OF PLAINTIFF THOMAS F. SMITH III IN A SPECIAL EDUCATION PROGRAM AT BRADLEY HOSPITAL PENDING THE CONCLUSION OF ADMINISTRATIVE APPEALS (JAN. 17, 1977)**

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

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| THOMAS F. SMITH, JR., et als. | ) | |
| | ) | |
| v. | ) | C.A. No. |
| | ) | 76-0510 |
| WALTER CURTIN, et als. | ) | |

MEMORANDUM

Plaintiffs, an eight year old multi-handicapped boy and his parents, contend that the defendants, the duly elected members of the Cumberland School Committee (hereinafter the Committee), have failed to observe the requirements of Article IX, Paragraph 4.1 of the General Regulations (for) Education of Handicapped Children, thereby violating their due process rights.

Jurisdiction is correctly based on 28 U.S.C. §1331 and 28 U.S.C. §1343. The cause of action is created by 42 U.S.C. 1983. A temporary restraining order is in effect, a hearing has been held, and the matter is now before the Court on application for preliminary injunction.

Thomas F. Smith, III, suffers from both physical and emotional handicaps, and has a long history of being unable to fit into the educational environment provided for him. Tommy walks with the aid of leg braces and crutches due to problems created by cerebral palsy which have affected him since birth. He is currently successfully enrolled in a state approved "special education program" at the Emma Pendleton Bradley Hospital.[1/] He was placed in the day program at the Bradley Hospital on December 6, 1975 by the defendant members of the school committee. It is not disputed that Tommy has benefited from the many services and programs in the day

program. Indeed, the Superintendent of Schools for Cumberland has written to the Smiths that "The Committee believes that Emma Pendleton Bradley Hospital provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him."

Nevertheless, the Committee has informed the Smiths that it has decided to withdraw that portion of the funding which it feels is not its responsibility for Tommy's placement at Bradley Hospital. The Committee reasons that, since Tommy is an "emotionally disturbed" child as defined in R.I.G.L.§40.1-7-4 (Supp. 1975), his education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals (MHRH) by virtue of Chapter 7 of Title 40.1 of the General Laws of the State of Rhode Island.[2/] The Smiths have availed themselves of the Committee's offer of a hearing scheduled for January 7, 1977, but the

Committee has refused their request to delay the funding termination pending the hearing and any available appeals.

Plaintiffs make two related constitutional claims. First, they contend that applicable state regulations require that Tommy's placement at Bradley Hospital continue until all state process is exhausted. They argue that defendants deprive them of due process by failing to follow these regulations. Second, assuming arguendo that the regulations do not apply to the facts of this case, they contend that due process requires that termination of Tommy's benefits cannot precede final determination of his right to such benefits under the rule of Goldberg v. Kelley, 397 U.S. 254 (1970).

On application for preliminary injunctive relief, of course, the court must find that plaintiffs have a likelihood of succeeding on the merits and will suffer irreparable harm without injunctive relief. The Court

must also weigh the harm to defendants should the injunction issue, and consider the public interest. See, e.g., Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958).

It is elementary that government must follow the law just as private citizens must. The government's failure to treat its citizens in accordance with applicable procedures, specified by law, deprives those citizens of due process of law. Vitarelli v. Seaton, 359 U.S. 535 (1959); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). Therefore, if defendants are bound by the regulations in questions, their failure to follow them would constitute a deprivation of due process cognizable under 42 U.S.C. §1983.

Paragraph 4.1 of Article IX of the General Regulations -- the Education of Handicapped Children provides:

4.0 Placement of Child During Pendency of Proceedings

4.1 During the pendency of any proceedings conducted pursuant to 1.0 and 2.0 above, unless the (Committee) and the parents or guardians otherwise agree, the child shall remain in his/her currrent education placement, or, if applying for initial admission to a public school, shall, with the consent of the parent or guardian, be placed in a regular class in the public school program until all such proceedings have been completed. The sole exception in either case shall be when the Superintendent upon substantial evidence determines that the child will be an immediate danger to himself or to others. Any such decision may be contested through the procedures in 1.0 and 2.0 above.

Defendants contend that the present controversy over their continued funding of Thomas is not a proceeding covered by paragraphs 1.0 and 2.0.[3/] According to their reasoning, paragraphs 1.0 and 2.0 cover only proceedings where the Committee and parents disagree to the proper placement for a child. Since the Committee agrees that Bradley is the proper

placement, but disagrees that it is responsible for continued funding of the placement, it argues that its decision to terminate funding does not create a paragraph 1.0 or 2.0 proceeding, and that the continuence of placement provision of paragraph 4.1 is inapplicable.

The defendants' contention is without merit. The procedural safeguards mandated by regulation are applicable:

> whenever the LEA (local education agency, e.g., the school committee) proposes to initiate or change or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate education.[4]/
> (emphasis added)

The decision of the Committee to terminate funding because it believes it is no longer responsible for Thomas' education fits precisely into the category of situations covered by paragraph 4.1 (incorporating paragraphs 1.0 and 2.0), in which placement must be continued pending final resolution of the

problem by state authorities, since the Committee "proposes to ...change...the provision of a free appropriate education."

The reason why the Committee proposes to change Tommy's educational program is not relevant. The regulations do not contain an exception to the continued placement provision for changes based on a school committee's jurisdictional disputes with MHRH. The policies supporting the continuance of placement regulation do not lose force depending on the nature of the school committee's justification for a change. The harm to the child resulting from mistaken removal from a placement once deemed "appropriate" is the same whether the Committee has a dispute over its responsibility vis a vis another state agency or a dispute over the appropriateness of the placement. In either case, a Handicapped child's carefully achieved progress and hard won benefits may be lost or jeopardized by by wrongful removal. If the school

committee later turns out to have been mistaken, the child cannot be reimbursed for the time and continuity he has lost.[5] Here, by contrast, should the Committee eventually prevail, it can seek reimbursement of its funds from MHRH.[6]

What has just been said regarding the probability of success on the merits also suffices to demonstrate where the balance of the equities lies in this case. The harm Tommy would suffer were he to be forced out of a program which all parties agree is appropriate and beneficial would far outweigh the temporary inconvenience suffered by the town in funding his program, subject to later reimbursement from MHRH should it prevail. The public interest seems to lie heavily on Tommy's side. The legislature has declared that strong public policy supports the provision of the best possible education and training to children with Tommy's handicaps, so that they will have an opportunity to

become self-supporting and not dependent on the help of their fellow-citizens.

The requirements for the issuance of a preliminary injunction are satisfied. Plaintiffs will prepare an order, and submit it to the court, directing that Thomas F. Smith III be maintained in the day program at Emma Pendleton Bradley Hospital at defendants' expense during the pendency of any hearing conducted pursuant to Article IX Procedural Safeguards of the Regulations Education of Handicapped Children and Title 16 Chapter 39 of the General Laws of Rhode Island.

/s/ Raymond J. Pettine
Chief Judge
January 17, 1977

## FOOTNOTES

1/ The duties of the local school committees to provide for special education are created by Title 16, Chapter 24 of the General Laws of Rhode Island (1969 reenactment, Supp. 1975). The General Regulations of the State Board of Regents Governing the Special Education of Handicapped Children, implementing R.I.G.L. §16-24-1, et seq, are issued pursuant to authority granted in R.I.G.L. §16-24-2. Such regulations have the force of law. Article I of the General Regulations provides:

I. Definitions

A. Exceptional Handicapped Children -- is defined to include children who are emotionally handicapped, mentally retarded (educable, trainable, severe and profound); physically handicapped (health impaired, hearing, homebound, neurologically, orthopedically, speech, aphasic, and visually); and multi-handicapped. A child so defined shall be eligible for special education upon the attainment of his third birthday until such time as he has completed high school or reaches the age of twenty-one whichever comes first.

B. Special Education -- is defined as educational facilities, materials,

evaluative services, therapeutic services, and instruction which are especially designed and operated by personnel with special educational qualifications, to meet the particular needs of exceptional handicapped children.

Tommy is both "emotionally handicapped" and "physically (orthopedically) handicapped", and therefore "multi-handicapped".

2/ R.I.G.L. §40.1-7 (3) provides in relevant part:

> Responsibility of department.--The department is charged with the responsibility to promote the development of specialized services for the care and treatment of emotionally disturbed children...and to take the initiative in all matters involving the interests of such children where adequate legal provision therefore has not already been made....

"Care and treatment" are defined in R.I.G.L. §40.1-7-4(1) as follows:

> "Care and treatment" means medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular or

special education programs under the jurisdiction of the board of regents for education. (emphasis added.)

The responsibilities of MHRH regarding emotionally disturbed children are set forth in some detail by the Rhode Island Supreme Court in Naughton v. Goodman, No. 75-25 Appeal (October 5, 1976). That decision makes it clear that the responsibility of MHRH to provide "care and treatment" for an "emotionally disturbed child" does not include funding any special education programs under the jurisdiction of the Board of Regents of Education. Id., slip op. at 4. A child may be both "emotionally handicapped" (the responsibility of the local school committees and the Board of Regents of Education) and "emotionally disturbed" (the responsibility of MHRH). However, for such a child, so much of a program as is "special education" in a program approved by the Board of Regents must be provided pursuant to R.I.G.L. §16-24-1 et seq. Anything in the program beyond that which is included in the definition of "special education", supra note 1, is the responsibility of MHRH.

3/ Article IX, paragraph 1.0 provides in relevant part:

IX. Procedural Safeguards

1.0 LEA Responsibility

1.1 Each LEA (local educational agency) shall establish and maintain procedures to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provisions of free appropriate education by such agency. Such procedures shall include but need not be limited to:

1.1.1 Written prior notice to the parent or guardian whenever the LEA proposes to initiate or change or refuses to initiate or change the identification, evaluation or educational placement of the child or the provisions of a free appropriate education.

1.1.4.1 Such appeal shall be submitted in writing within ten school days.

1.1.4.2 A hearing shall be held by the School Committee or its designated hearing officer and a decision shall be given not later than thirty days after the appeal.

1.1.4.3 A copy of the decision shall be mailed to the parents, together with a notice informing them of their right to and procedure for further appeal.

Paragraph 2.0 provides for appeal of the School Committee's decision to the state Board.

4/ Paragraph 1.1.1, Article IX, General Regulations of the State Board of Regents Governing the Special Education

of Handicapped Children (December 19, 1963, amended June 15, 1972), cited in full supra n.3.

5/ The harm likely to be suffered by a child if the Committee makes a wrong decision would be an important factor in deciding whether the continuance of placement provision was constitutionally required. Cf. Mathews v. Eldridge, 424 U.S. 319 (1976) (due process does not require full procedural safeguards prior to benefit termination where, inter alia, harm from mistken initial determination can be remedied by financial reimbursemnt after post-termination proceedings.) The likelihood that wrongful removal from Bradley Hospital would seriously, and perhaps irremediably, jeopardize Tommy's progress and current well-being weighs especially heavily, for purposes of equitable relief, since that harm might well be irreparable by a later award of monetary damages.

Acting under its powers pursuant to section 5 of the Fourteenth Amendment, Congress has declared that continuance of placement pending completion of state proceedings will be mandatory after October 1, 1977. See 20 U.S.C. §1415(e).

6/ Because the Court holds that the defendants violate due process by failing to follow the applicable state regulations, it does not reach plaintiffs' argument that, even lacking the regulations, due

process would require Tommy's continued placement pending final state resolution of this dispute. Furthermore, since the Court finds the Committee's decision clearly falls within the category of decisions triggering the continued placement provisions of paragraph 4.1 of Article IX of the General Regulations, the Court does not consider plaintiffs' contention that defendants' justification for the funding termination, agreeing that Tommy's placement is proper but alleging a jurisdictional dispute with MHRH, is a transparent attempt to escape their responsibility for funding Tommy pending state proceedings.

**FIRST AMENDED COMPLAINT (MAY 10, 1978)**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR., URSULA J. SMITH, Parents Guardians and Next Friends of Thomas F. Smith, III, and THOMAS F. SMITH, III | : | |
| VS | : | C.A. No. 76-0510 |
| CUMBERLAND SCHOOL COMMITTEE, WILLIAM P. ROBINSON, JR., Associate Rhode Island Commissioner of Education, THOMAS SCHMIDT, Rhode Island Commissioner of Education, THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION, and DR. JOSEPH BEVILACQUA, Director of Rhode Island Department of Mental Health, Retardation and Hospitals | : | |

FIRST AMENDED COMPLAINT

PREAMBLE

This action arises under the Constitution and laws of the United States, more specifically, the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the Education of the

Handicapped Act (20 U.S.C. §§ 1401, et seq.). It is brought to secure to the minor plaintiff his right to a free, appropriate education, suited to his special needs as a handicapped child and his right not to be deprived of said education except by due process of law.

This is an appeal from a final decision of the Rhode Island state educational agency which adversely effects the plaintiffs. This Court has subject-matter jurisdiction under 20 U.S.C. §§ 1415(e)(2) and 1415(e)(4) without regard to the amount in controversy.

The amount in controversy exceeds $10,000.00 exclusive of interest and costs. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331. Declaratory relief is proper pursuant to 28 U.S.C. §§ 2201 and 2202.

## PARTIES

1. Plaintiffs, THOMAS V. SMITH, JR., and URSULA J. SMITH are husband and wife, residents of Cumberland, Rhode Island and parents of THOMAS F. SMITH, III. THOMAS F. SMITH, III (hereinafter "Tommy") is a minor child, born February 28, 1968, who is and has been at all times mentioned herein, handicapped physically and mentally because of the effects of cerebral palsy which has affected him since birth. As a result of his handicaps, he has been unable to obtain the advantages and opportunities of education and is in need of "special education" and "related services" as those terms are defined in 20 U.S.C. §§ 1401(16) and 1401(17), respectively, and in 45 C.F.R. §§ 121a.14 and 121a.13, respectively.

2. The defendant, CUMBERLAND SCHOOL COMMITTEE, (hereinafter "the School Committee") is the Rhode Island local educational agency (LEA) which is directly responsible

for providing special education and related services, without cost, appropriate to Tommy's needs as a handicapped child.

3. The defendant, WILLIAM P.ROBINSON, JR. is the Associate Rhode Island Commissioner of Education, (hereinafter "the Associate Commissioner") and the person who has had, at all times mentioned herein, the responsibility to review decisions of the LEA's in Rhode Island, and render decisions on behalf of the Rhode Island Department of Education. The Rhode Island Department of Education (hereinafter "the SEA") is the state educational agency for the State of Rhode Island. The Associate Commissioner is an employee of the SEA, with various and sundry duties, other than acting as a hearing officer for appeals regarding matters of special education from the LEA's in Rhode Island.

4. The defendant, THOMAS SCHMIDT, is the Rhode Island Commissioner of Education

(hereinafter "the Commissioner") and the person designated by Rhode Island law with the responsibility to hear appeals regarding matters of special education from the LEA's in Rhode Island. He has delegated his responsibility and his attendant powers and duties to the Associate Commissioner.

5. The defendant, RHODE ISLAND BOARD OF REGENTS FOR EDUCATION (hereinafter "the Board of Regents") is the organ of Rhode Island government which has the power to adopt policies and procedures with regard to the substantive and procedural rights of handicapped children who reside within the State of Rhode Island. It has general supervisory powers over the educational process within the State of Rhode Island and the duty to enforce the provisions of all laws relating to said educational process.

6. The defendant, DR. JOSEPH BEVILACQUA, is the Director of the Rhode Island Department of Mental Health, Retardation and

Hospitals, (hereinafter "MHRH") and according to the decision of the Associate Commissioner, MHRH is responsible for Tommy's education. The said defendant is joined herein so that he may be fully informed and take such part herein as he may desire, so that complete relief may be afforded between the parties, and a multiplicity of actions avoided.

COUNT I

7. By letter dated November 5, 1976, a copy of which is annexed hereto as Exhibit A, the Cumberland Superintendent of Schools informed Tommy's parents that while he agreed Tommy's placement in a program at Emma Pendleton Bradley Hospital, licensed by the SEA as a special education program for emotionally disturbed children:

> "provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him."

it was his position that:

> "...his (Tommy's) education and care are the responsibility of the Division (Department) of Mental Health, Retardation and Hospitals."

8. Plaintiffs timely appealed the Superintendent's decision, pursuant to the applicable provisions of the Board of Regents - Regulations Education Handicapped Children (hereinafter "State Regulations"), to the School Committee, and on January 20, 1977 a hearing was conducted before the said School Committee on the issue of whether the School Committee or MHRH had the responsibility to provide further funding of Tommy's placement in the program at Bradley Hospital.

9 Immediately after the hearing concluded, the School Committee voted unanimously to uphold its Superintendent of Schools and in effect told Tommy and his parents that it had no responsibility to provide him with a free, appropriate education since it felt he was "emotionally dis-

turbed" and therefore the responsibility of MHRH.

10. On February 10, 1977, the School Committee rendered a written decision. A copy of this decision is annexed hereto as Exhibit B.

11. From that decision, plaintiffs appealed to the Commissioner, and the matter was heard de novo by the Associate Commissioner, on November 2, 1977, November 21, 1977, and December 21, 1977.

12. By motion made October 24, 1977, plaintiffs asked the Associate Commissioner to recuse himself since he was not an impartial hearing officer, as required by federal law. A copy of the Motion to Recuse is annexed hereto as Exhibit C. The Associate Commissioner denied plaintiffs' motion by letter dated October 28, 1977, a copy of which is annexed hereto as Exhibit D.

13. The requirement of the State Regulations that plaintiffs submit the contro-

versy between themselves and the School Committee to the School Committee itself, violates plaintiffs' right to a hearing before an impartial tribunal as guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and 20 U.S.C. § 1415 (formerly 20 U.S.C. § 1413(a)(13)).

14. The hearing conducted before the Associate Commissioner, likewise denied the plaintiffs procedural due process as guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; 20 U.S.C. § 1415; and final regulations adopted by the United States Department of Health, Education and Welfare; specifically, 45 C.F.R. §§ 121a.506, 121a.507, 121a.510 and 121a.512.

15. On April 17, 1978, the Associate Commissioner made a decision on the merits. Plaintiffs received a copy of this decision on April 25, 1978. A copy is annexed hereto

as Exhibit E. Said decision is a nullity since the hearing was conducted before the Associate Commissioner and he is a person disqualified by law from hearing such matters as Tommy's appeal from his LEA. The decision states:

> "...it is the responsibility of MHRH to provide special education and related services for Thomas at Bradley Hospital and that the School Committee is required to contribute to MHRH the 'per pupil cost' as its share of the cost of the special educational and related services provided to Thomas."

The Associate Commissioner, in a final footnote to his decision, disposed of plaintiffs' argument that they can not be required to contribute to the cost of providing Tommy with an appropriate special education, as would be the case if MHRH were the agency which placed him in the special education program at Bradley Hospital. He noted:

> "The appellants (plaintiffs) have also asserted that they are not required to pay MHRH any amount for the services provided to Thomas. Their argument in this regard is based on various federal statutes and regulations and, ultimately

on the Supremacy Clause of the United States Constitution. (Art. VI, Para. 2). This issue, however, is not within our jurisdiction on this appeal."

16. At all times mentioned herein, the State of Rhode Island, through the SEA has submitted a State Plan, pursuant to 20 U.S.C. § 1413, to the U.S. Office of Education and in return has received federal funds for state administered programs of special education and related services. Each said State Plan has incorporated the State Regulations and therefore, said Regulations become a binding part of the State Plan and are enforceable as part of the federal statutes and regulations relating to education of handicapped children.

WHEREFORE, plaintiffs seek relief as follows:

1. A declaratory judgment that the procedural safeguards contained in Article IX of the State Regulations do not comply with the Due Process Clause of the Fourteenth

Amendment to the Constitution of the United States; the provisions of 20 U.S.C. § 1415 and 45 C.F.R. §§ 121a.506, 121a.507, 121a.510 and 121a.512.

2. A prohibitory injunction against the Commissioner and Associate Commissioner conducting any more hearings in review of decisions of the Rhode Island LEA's until and unless the defendants, Board of Regents, adopts regulations which conform in all respects to the requirements of 20 U.S.C. 1415 and Chapter 121a of Title 45 - Code Federal Regulations.

3. Reasonable attorneys' fees.

4. Their costs in this action.

5. Such additional and further relief as the Court deems just in the circumstances of this case.

COUNT II

16. The assertion of the School Committee and the Associate Commissioner of Educa-

tion that MHRH is responsible for the cost of Tommy's placement in an appropriate educational program is a transparent attempt, both by the LEA, and the SEA, to avoid responsibility for children such as Tommy for which the LEA can not provide, within the local school system, an appropriate education. In addition, it violates Tommy's rights under federal and state law to have his LEA provide a free, appropriate educational placement without regard to whether or not said placement can be made within the local school system.

17. The decisions of the LEA and the SEA are based soley on fiscal considerations and are not mindful of federal law or Tommy's urgent need for an appropriate educational placement which provides "special education" and "related services".

18. Unless this Court had previously interceded on Tommy's behalf, and ordered the School Committee to continue funding Tommy's

placement, pending exhaustion of state administrative remedies, he would be on the outside looking in while losing the precious benefits he has received at Bradley Hospital.

19. The program at Bradley Hospital has, in fact, provided Tommy with only a "special education" and "related services".

20. Despite being handicapped by, among other things, a serious emotional disturbance, Tommy is entitled to a free, appropriate education at the expense of his LEA.

21. The decision of the Associate Commissioner, in addition to being fatally defective because it vioaltes Tommy's procedural due process rights, is erroneous because it is unsupported by any substantial evidence. It is therefore arbitrary, discriminatory and unfair.

WHEREFORE, plaintiffs seek relief as follows:

1. Review and reversal of the final decision of the SEA (Exhibit E).

2. A declaratory judgment that the School Committee, and not MHRH, is responsible to provide Tommy a free education appropriate to his special needs as a handicapped child.

3. A mandatory injunction against the School Committee, requiring it to provide a free education to Tommy, appropriate to his special needs as a handicapped child.

4. Reasonable attorney's fees.

5. Their costs in this action.

6. Such additional and further relief as the Court deems just in the circumstances of this case.

THOMAS F. SMITH JR.
URSULA J. SMITH,
Parents, Guardians and Next
Friends of Thomas F. Smith, III;
THOMAS F. SMITH, III.
By their attorneys,
OSTER, FAY, GROFF & PRESCOTT
936 Smithfield Avenue
Lincoln, Rhode Island 02865

/s/
GEORGE M. PRESCOTT

Dated: May 10, 1978

[Certificate of Service omitted in printing]

**EXHIBIT A TO THE FIRST AMENDED COMPLAINT: LETTER DATED NOVEMBER 5, 1976 TO PLAINTIFFS LAWYER FROM THE SUPERINDENT OF SCHOOLS STATING THAT THE EUDCATION OF PLAINTIFF THOMAS F. SMITH III WILL NO LONGER BE PAID BY THE CUMBERLAND SCHOOL COMMITTEE**

[This exhibit is the same exhibit as Exhibit B to the Complaint. It is set forth in this Joint Appendix supra at 25-26.]

**EXHIBIT B TO THE FIRST AMENDED COMPLAINT: DECISION OF THE CUMBERLAND SCHOOL COMMITTEE DATED FEBRUARY 10, 1977 AFFIRMING THAT THE EDUCATION OF PLAINTIFF THOMAS F. SMITH III WILL NO LONGER BE PAID BY THE CUMBERLAND SCHOOL COMMITTEE**

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

CUMBERLAND SCHOOL COMMITTEE

**********

HEARING IN RE:

THOMAS F. SMITH, JR., URSULA J. SMITH, parents, guardians and next friends of THOMAS F. SMITH, III, and THOMAS F. SMITH, III

vs.

SCHOOL COMMITTEE OF THE TOWN OF CUMBERLAND

**********

DECISION

This matter was heard by the Cumberland School Committee on January 20, 1977, on the Appeal of Thomas F. Smith, Jr. and Ursula J. Smith, parents of Thomas F. Smith, III, and

Thomas F. Smith, III from the Decision of Robert G. Condon, Superintendent of Schools, dated November 5, 1976, that "Thomas is an emotionally disturbed child as defined in Section 40.1-7-4 of the General Laws of Rhode Island, 1956, As Amended, and as such, by virtue of Chapter 7 of Title 40.1 of the General Laws, his education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals." Due notice was given to the interested parties of the time and place of the hearing. The Appellants and School Committee were represented by Counsel. Testimony was taken, a transcript of which was made, and evidence was presented. Upon the testimony so taken and the evidence presented, we find the following:

1. Thomas F. Smith, III was admitted to Emma Pendleton Bradley Hospital in the Day Hospital Program and is still in that Program. He was admitted on December 9, 1975.

2. The Cumberland School Committee agreed to pay to the Hospital the average per pupil cost for Thomas and the balance of the charges of the Hospital were funded by the Hospital from other sources. This arrangement continued to the end of the school year in June, 1976.

3. In September, 1976, the School Committee of Cumberland again agreed to pay the average per pupil cost to the Hospital for Thomas but the additional funding was unavailable. To the date of the hearing, the Cumberland School Committee had paid almost double the per pupil cost.

4. On November 5, 1976, Superintendent of Schools, Robert G. Condon, informed the parents of Thomas through their attorney that Thomas's education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals.

5. In an Action brought by the parents of Thomas in the United States District Court

for the District of Rhode Island, Judge Pettine ordered the School Committee to continue Thomas's placement at Bradley until the appeals process in his case was concluded and that the School Committee be responsible for payment of the Hospital's charges during that period.

6. Thomas has been diagnosed as being emotionally disturbed.

7. Thomas has been disgnosed by an examining physician as being in need of psychiatric care and treatment.

8. At Bradley, Thomas sees a psychiatrist at least weekly.

9. Thomas has had periodic operations on his legs because of cerebral palsy. He has physical limitations and disabilities resulting from cerebral palsy. By definition, page 20 of the Regulations - Education of Handicapped Children of the State Department of Education because of his I.Q. Thomas is not an "Orthopedically Handicapped Child."

10. The Program in which Thomas is enrolled at Bradley is approximately one-third educational; one-third psychiatric and one-third physical.

11. Thomas has made progress at Bradley but "has a long way to go."

12. A referral of Thomas's case to the Department of Mental Health, Retardation and Hospitals was made by Bradley Hospital.

13. No determination has yet been made in Thomas's case by the Screening Committee of Mental Health, Retardation and Hospitals because of the time it took to obtain the necessary information from the various agencies involved. However, such information is now in the possession of the Department of Mental Health, Retardation and Hospitals.

14. Because of funding problems, there is a waiting list of 30 to 35 children for the services provided by the Department of Mental Health, Retardation and Hospitals.

It is our opinion that the education and care of Thomas by virtue of Chapter 7 of Title 40.1 of the General Laws of Rhode Island, 1956, As Amended, are the responsibility of the Department of Mental Health, Retardation and Hospitals. Accordingly, the Appeal is denied.

The Appellants have thirty (30) days to appeal this Decision.

/s/
Edward P. Mousseau

/s/
William J. O'Coin, Jr.

/s/
Louis C. Goodrich

/s/
Walter S. Curtin

/s/
Paul E. Poirier

/s/
Louis J. Kolodzie

February 10, 1977

**EXHIBIT C TO THE FIRST AMENDED COMPLAINT: MOTION BY PLAINTIFFS' COUNSEL DATED OCTOBER 24, 1977 TO DISQUALIFY WILLIAM P. ROBINSON JR. AS A STATE ADMINISTRATIVE HEARING OFFICER**

STATE OF RHODE ISLAND
PROVIDENCE, Sc.

DEPARTMENT OF
EDUCATION

THOMAS F. SMITH, III

-vs-

CUMBERLAND SCHOOL COMMITTEE

MOTION TO RECUSE

Now comes the appellant, Thomas F. Smith, III, and moves that Associate Commissioner of Education, William P. Robinson, Jr., be recused and disqualified from hearing this appeal since he is an employee of the State Educational Agency with such various duties that he is not impartial.

Appellant also moves that the Commissioner of Education appoint some other person to hear this matter who is independent from the State Educational Agency in so far as

his/her duties do not conflict with appellant's right to an impartial hearing officer.

By his attorneys,
OSTER, FAY, GROFF, & PRESCOTT
936 Smithfield Avenue
Lincoln, Rhode Island 02865

/s/
GEORGE M. PRESCOTT

Dated: October 24, 1977

**EXHIBIT D TO THE FIRST AMENDED COMPLAINT: DENIAL DATED OCTOBER 28, 1977 OF PLAINTIFFS' MOTION TO DISQUALIFY**

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF EDUCATION
Hayes Street, Providence, Rhode Island 02908

* * *

October 28, 1977

George M. Prescott, Esq.
936 Smithfield Avenue
Lincoln, RI 02865

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Re: Thomas F. Smith, III
Vs: Cumberland School Committee

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Dear Mr. Prescott:

This is to acknowledge receipt of your letter of October 24 concerning the captioned matter together with the enclosed motions.

With reference to the motion to recuse, I am enclosing a self-explanatory ruling.

In reference to the motion to issue subpoenas, please be advised that the Commissioner of Education does not have authority to issue subpoenas. You are free, of course, to contact the parties and ask them to attend the hearing.

Sincerely,

/s/
William P. Robinson Jr.
Associate Commissioner of
Education

jjj
Enclosure

cc: James Shannahan, Esq.

[Title omitted.]

Appellants motion to recuse, dated October 24, 1977, is denied on the authority of Jennings v. Exeter-West Greenwich Regional School District Committee, 352 A.2d 634 (R.I. 1976) and Witherow v. Larkin 421 U.S. 35 (1975).

/s/ William P. Robinson
Associate Commissioner of
Education

/s/ Arthur R. Pontarelli
Acting Commissioner of
Education

October 28, 1977

**EXHIBIT E TO THE FIRST AMENDED COMPLAINT: DECISION DATED APRIL 17, 1978 BY THE STATE COMMISSIONER OF EDUCATION AFFIRMING THAT THE EDUCATION OF PLAINTIFF THOMAS F. SMITH III IS NOT WITHIN THE JURISDICTION OF THE STATE BOARD OF REGENTS FOR EDUCATION AND THAT PLAINTIFFS' EDUCATION ACCORDINGLY NEED NOT BE PAID BY THE CUMBERLAND SCHOOL COMMITTEE**

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS — COMMISSIONER OF EDUCATION

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MR. & MRS. THOMAS F. SMITH, JR. :

vs. :

CUMBERLAND SCHOOL COMMITTEE :

---

D E C I S I O N

April 17, 1978

This matter was heard on November 2 and 21 and December 21, 1977 upon the appeal to the Commissioner of Education of Mr. and Mrs. Thomas F. Smith, Jr. from a decision of the Cumberland School Committee denying their request that the School Committee pay the

cost of the attendance of their son, Thomas F. Smith, III, in the Day Hospital Program at the Emma Pendleton Bradley Hospital in East Providence, Rhode Island.

The Commissioner has jurisdiction to hear the appeal by virtue of the provisions of Section 16-39-2 of the General Laws of Rhode Island, 1956, as Amended. The matter was heard by the Associate Commissioner of Education under authorization from the Commissioner.

Due notice was given to the interested parties of the time and place of the hearing. Both parties were represented by counsel. Testimony was taken, a transcript of which was made, and evidence was presented. Upon the testimony so taken and the evidence so presented, we find the following:

1. The appellants and their son, Thomas, are residents of the Town of Cumberland.

2. Thomas is nine years old. He is both "emotionally handicapped" and "physically (orthopedically and neurologically) handicapped."[1]

3. Thomas was enrolled in the Meeting Street School from 1972 until 1975 during which time the Cumberland School Committee paid the tuition for him to attend that school.[2] In September 1975, Thomas was enrolled in a special education class for neurologically impaired children at the Ashton School in the Cumberland School System; he remained there

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[1] The physician who is the Medical Director of the Day Hospital Program and the Director of Community Mental Health at Bradley Hospital and whose specialty is child psychiatry testified that Thomas is a boy of normal intelligence who suffers from a serious emotional disturbance; is both orthopedically and neurologically handicapped; and is in need of psychiatric services. His testimony was not disputed.

[2] The Director of Special Education in the Cumberland School Department testified that he believed the tuition was $1500 per year at that time.

until December 1975, when he was enrolled in the Day Hospital Program at the Emma Pendleton Bradley Hospital in East Providence, where he is currently enrolled.

4. The Day Hospital Program at Emma Pendleton Bradley Hospital is a Special Education Program approved for emotionally handicapped children by the Commissioner of Education in accordance with the Regulations of the Rhode Island Board of Regents for Education.

5. The School Committee paid the per pupil cost[3] for Thomas to attend the Day Hospital Program at Bradley Hospital for the 1975-76 school year.[4]

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[3] The "per pupil cost" is "the average per pupil cost" for the education provided by the School Committee for all children for the school year immediately preceding the year for which it is paid.

[4] The Director of Special Education in the Cumberland

6. The Superintendent of Schools wrote a letter to the attorney for the appellants on November 5, 1976, the text of which reads:

> I am responding to your letter of October 21, 1976.
>
> The Cumberland School Committee does not propose a change in placement for Thomas F. Smith, III. The Committee believes that Emma Pendleton Bradley Hospital provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him.
>
> Thomas is an emotionally disturbed child as defined in Section 40.1-7-4 of the General Laws of Rhode Island, 1956, As Amended, and as such, by virtue of Chapter 7 of Title 40.1 of the General Laws, his education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals.

---

School Department testified that the "per pupil cost" which the School Department is paying this year is $1186. He said that the School Committee had agreed to pay up to $2000 toward the cost of Thomas attending the Day Hospital Program at Bradley Hospital for the 1976-77 school year.

> If you desire a hearing before the School Committee, will you please let me know in writing and I will notify you of the date of the hearing.

7. On January 20, 1977, the School Committee held a hearing on the appellants' appeal from the decision of the Superintendent cited supra. The appellants were present and were represented by counsel at the hearing.

8. The School Committee rendered a decision dated February 10, 1977, which stated in pertinent part:

> It is our opinion that the education and care of Thomas by virtue of Chapter 7 of Title 40.1 of the General Laws of Rhode Island, 1956, as Amended, are the responsibility of the Department of Mental Health, Retardation and Hospitals. Accordingly, the Appeal is denied.

9. Subsequently counsel for the appellants appealed the decision of the School Committee to the Commissioner of Education.

10. The Associate Commissioner of Education scheduled a hearing on the appeal for November 2, 1977 and notified the concerned parties of the time and place of the hearing.

11. Counsel for the appellants wrote a letter to the Associate Commissioner on October 24, 1977 with which were enclosed a "Motion to Recuse" and a "Motion to Issue Subpoenas."

12. The Associate Commissioner replied to counsel for the appellants by letter dated October 28, 1977 and informed him that the Commissioner of Education did not have authority to issue subpoenas and enclosed with the letter the ruling of the Commissioner on the "Motion to Recuse", which reads:

> Appellant's motion to recuse, dated October 24, 1977, is denied on the authority of

Jennings v. Exeter-West Greenwich Regional School District Committee, 352 A.2d 634 (R.I. 1976) and Withrow v. Larkin 421 U.S. 35 (1975).

13. At the hearing before the Associate Commissioner on November 2, 1977, counsel for both parties stipulated to the following Findings in the decision of the School Committee rendered on February 10, 1977:

> 1. Thomas F. Smith, III was admitted to Emma Pendleton Bradley Hospital in the Day Hospital Program and is still in that Program. He was admitted on December 9, 1975.
>
> 4. On November 5, 1976, Superintendent of Schools, Robert G. Condon, informed the parents of Thomas through their attorney that Thomas's education and care are the responsibility of the Division of Mental Health, Retardation and Hospitals.
>
> 5. In an Action brought by the parents of Thomas in the United States District Court for the District of Rhode Island, Judge Pettine ordered the School Committee to continue Thomas's placement at Bradley until the appeals

process in his case was concluded and that the School Committee be responsible for payment of the Hospital's charges during that period.

11. Thomas has made progress at Bradley but "has a long way to go."

12. A referral of Thomas's case to the Department of Mental Health, Retardation, and Hospitals was made by Bradley Hospital.

13. No determination has yet been made in Thomas's case by the Screening Committee of Mental Health, Retardation and Hospitals because of the time it took to obtain the necessary information from the various agencies involved. However, such information is now in the possession of the Department of Mental Health, Retardation and Hospitals.

14. Because of funding problems, there is a waiting list of 30 to 35 children for the services provided by the Department of Mental Health, Retardation and Hospitals.

A special Assistant Attorney General appeared at the hearing before the Associate Commissioner on November 2, 1977 and moved that he be allowed to submit an amicus curiae

brief on behalf of the Department of Mental Health, Retardation and Hospitals (MHRH). The Associate Commissioner granted that motion, to which there had been no objection.

There is no disagreement between the parties concerning the placement of Thomas in the Day Hospital Program at Bradley Hospital. They are agreed that that is appropriate for him. They disagree, however, as to who is responsible for providing (i.e. paying the cost of) special education and related services for Thomas at Bradley Hospital.

The appellants contend that it is the responsibility of the School Committee; the School Committee contends it is the responsibility of MHRH; and MHRH contends it is the responsibility of the School Committee.

Section 16-24-1 of the Rhode Island General Laws reads:

> Duty of school committee to provide special education. - In any city or town where there is a child within the age range as designated by the regulations of the state

board of education, who is either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented, the school committee of such city or town shall provide such type of special education that will best satisfy the needs of the handicapped child, as recommended and approved by the state board of education in accordance with its regulations.

Section 16-24-2 of the Rhode Island General Laws reads:

> Regulations of state board. - It shall be the duty of the state board of education to set up regulations for the purpose of carrying out the intent of this chapter; such regulations shall include:
>
> 1. criteria to determine who is to be included in the category of the exceptional child and all persons from the age of three (3) to twenty-one (21) who are mentally retarded and/or multihandicapped must be included in establishing the category of exceptional child;
>
> 2. minimum criteria for establishment and/or reimbursement of special facilities (such as public school classes, hospital schools, etc.) for each category of exceptionality;
>
> 3. methods of reimbursement;

4. teacher-training recommendations, minimum teacher qualifications;

5. transportation; and

6. any other regulations the state board deems necessary to implement this chapter.

Pursuant to the provisions of § 16-24-2, the State Board of Education adopted Regulations: Education of Handicapped Children on December 19, 1963.[5] The sections of the General Regulations which we consider relevant to this matter are the following:

I. Definitions

A. Exceptional Handicapped Children - is defined to include children who are emotionally handicapped,[6]

---

[5] The Regulations of the State Board of Education became the Regulations of the Board of Regents for Education on July 1, 1970 upon the assumption by that Board on that date of all its powers and duties pursuant to the provisions of Chapter 231 of the Public Laws of 1969 and subsequently by the successor Board of Regents for Education as established by Chapter 249 of the Public Laws of 1973.

[6] The Emotionally Handicapped is defined in Section 1A of the Regulations Governing the Education of the Emotionally Handicapped as "a child whose diagnosed social and/or emotional problem is so severe that

mentally retarded (educable, trainable, severe and profound); physically handicapped (health impaired, hearing, homebound, neurologically, orthopedically, speech, aphasic, and visually); and multihandicapped. A child so defined shall be eligible for special education upon the attainment of this third birthday until such time as he has completed high school or reaches the age of twenty-one whichever comes first.

B. Special Education - is defined as educational facilities, materials, evaluative services, therapeutic services, and instruction which are especially designed and operated by personnel with special educational qualifications, to meet the particular needs of exceptional handicapped children.

II. Establishment of Special Education Programs

A. The school committee of each community shall establish within its school system the special education program required by these regulations and/or it shall provide for the free education of all

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adjustment to a regular class appropriate for his age is precluded."

resident exceptional handicapped children either through these programs or in other special programs approved by the Commissioner of Education. (Whenever a responsibilty is placed on a community by these regulations it shall be the responsibility of the school committee).

The Board of Regents for Education amended the Regulations on April 20, 1977, and the following sections of the General Regulations which we consider to be relevant to this matter became effective October 1, 1977:

II. Definitions

1.0 Handicapped Children - Includes all children who are behaviorally disordered,[7] mentally retarded, physically handicapped, (health impaired, hearing, homebound, neurologically, orthopedically, speech, aphasic, and visually), multi-handicapped and learning disabled as herein-

[7] It should be noted that, although the cateogry of "emotionally handicapped" children is not listed in the definition of Handicapped Children cited supra, the category of "behaviorally disordered" children does include those children who are emotionally handicapped and emotionally disturbed.

after defined. Any child so defined shall be eligible for special education upon the attainment of his/her third birthday and until such time as he/she has completed high school or reaches the age of twenty-one (21), whichever comes first.

1.1 The Behaviorally Disordered: A child who exhibits a significant and observable disorder to a marked degree over an extended period of time (as determined by the evaluation process) in one or more of the following:

1.1.1 Extreme difficulty in learning which cannot be explained by intellectual, sensory, neurophysiological, or general health factors; nor can it be attributed to ethnic or cultural differences;

1.1.2 Consistent inability in establishing or maintaining satisfactory interpersonal relationships with peers and/or teachers.

1.1.3 Constant and pronounced inappro-

priate or immature types of behavior or feelings under normal conditions;

1.1.4 General pervasive mood of unhappiness or depression to a marked degree and over a significant length of time;

1.1.5 Psychosomatic complaints related to personal, social, or school problems;

1.1.6 The above definition should include but not be limited to disorders which are referred to as: autism, schizophrenia, neurosis, psychosis, emotional handicap and emotional disturbance. (Emphasis added.)

2.0 Special Education - is defined as appropriate educational services, facilities, materials, individualized instruction, evaluative services, therapeutic and other related services provided at no cost to the parents or guardians and which are especially designed and operated by personnel with special

educational qualifications to meet the particular needs of handicapped children.

7.0 Therapeutic and Related Services - is defined to include transportation and such developmental, corrective and other supportive services (including but not limited to special individualized assistance in math and remedial reading, guidance and counseling, physical education, speech pathology and audiology, psychological services, physical and occupational therapy, recreation, mobility training, and medical services except that such medical services shall be for diagnosis and evaluation only) as may be required to assist a handicapped child to benefit from special education and includes the early identification and assessment of handicapping conditions in children.

III. Establishment of Special Education Programs

1.0 Responsibility - The school committee of each school district shall establish within its

school district the special education required by these regulations and/or it shall provide for the free education of all resident handicapped children either through these programs or in other special education programs approved by the Commissioner of Education. (Whenever a responsibility is placed on a school district by these regulations it shall be the responsibility of the school committee to carry out these regulations.)

The sections of § 40.1-7 of the Rhode Island General Laws which we consider to be relevant to this matter are the following:

40.1-7-2. State program created. - There is hereby established within the department of mental health, retardation and hospitals a program to be known as "Services for emotionally disturbed children."

40.1-7-3 Responsibility of department. - The department is charged with the responsibility to promote the development of specialized services for the care and treatment of emotionally disturbed children and to cooperate to his end with all reputable agencies of a public

or private character serving such children and to take the initiative in all matters involving the interests of such children where adequate legal provision therefor has not already been made.

40.1-7-4 Definition. - Whenever used in this chapter, or in any order, rule or regulation made or promulgated pursuant to this chapter, or in the printed forms prepared by the department or the director, unless otherwise expressly stated, or unless the context or subject matter otherwise requires, the term:

1. "Care and treatment" means medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular or special education programs under the jurisdiction of the board of regents for education.

. . .

5. "Emotionally disturbed child" means any person under the age of twenty-one (21) years, and who has been diagnosed and judged by the examining physician to be in need of psychiatric care and treatment.

40.1-7-7. Contributions from communities [Effective until July 1, 1979]. - Each community, as defined in Chapter [7 of title 16] of the general laws, shall contribute to the department, in accordance with regulations to be promulgated by the director, its average per pupil cost for education for the reference year, as "reference year" is defined in said chapter [7 of title 16] as its share of the cost of the educational services furnished to emotionally disturbed children in programs other than those regular class or special education programs under the jurisdiction of the board of regents for education. (Emphasis added.)[8]

40.1-7-8 Contribution from parents. - The parents of children in the program, depending upon their resources, shall be obligated

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[8] Section 4 of Chapter 130 of P.L. 1976 amended this section (effective July 1, 1979) to read:

Each community, as defined in chapter 7 of title 16 of the general laws, shall contribute to the department, in accordance with regulations to be promulgated by the director, its aveage per pupil cost for special education for the second school year preceding as its share of the cost of the educational services furnished to emotionally disturbed children in programs other than those regular class or special education programs under the control and management of the school committee. (Emphasis added.)

> to participate in the costs of the care and treatment of their children in accordance with regulations to be promulgated by the director.

The appellants contend that the School Committee's position is untenable in that, pursuant to §40.1-7 of the Rhode Island General Laws, MHRH's responsibility is to provide care and treatment for emotionally disturbed children and that "care and treatment" are defined to include "medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular class or special education programs under the jurisdiction of the board of regents for education." (Emphasis added.) The appellants contend that because the Day Hospital Program at Bradley Hospital has been approved by the Commissioner of Education as a special

education program for emotionally handicapped children, that program is under the jurisdiction of the Board of Regents for Education. They contend, therefore, that it is not the responsibility of MHRH to pay for Thomas's education at Bradley Hospital, but rather it is the responsibility of the School Committee.

We do not concur with the appellants' contention that, merely because it has been approved by the Commissioner of Education, the program at Bradley Hospial is under the "jurisdiction" of the Board of Regents. We believe that the approval of the program by the Commissioner of Education permits Bradley Hospital lawfully to operate the program in accordance with the Regulations of the Board of Regents and to be eligible to receive such public and/or private funds for which the approval of the program by the Commissioner of Education is required. It is our opinion, however, that this approval of the program by

the Commissioner of Education does not remove the program from the jurisdiction of the governing body of Bradley Hospital. Therefore, we find that the special education program at Bradley Hospital is not under the jurisdiction of the Board of Regents for Education.

We believe that the reference in §40.1-7 to "those regular class or special education programs under the jurisdiction of the board of regents for education" means in effect those programs under the control and management of the school committee. We believe that the General Assembly's substitution of the words "under the control and management of the school committee" in §40.1-7-7 (as amended effective July 1, 1979) for the words "under the jurisdiction of the board of regents for education" give additional support to our interpretation of the words in question.[9] Thus, it is our opinion that, pursuant to the provisions of §40.1-7, it is

the responsibility of MHRH to provide special education and related services for Thomas at Bradley Hospital and that the School Committee is required to contribute to MHRH the "per pupil cost" as its share of the cost of the educational and related services provided to Thomas.[10]

The School Committee paid the per pupil cost for Thomas to attend Bradley Hospital

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[9] See footnote 8.

We realize that subsequent legislation is a tool of very limited utility in interpreting earlier enactments. Nevertheless, the wording of the amendment which will become effective on July 1, 1979 can be viewed as an indication that the General Assembly understands the present statute as we do and sought to clarify its somewhat opaque language.

In any event we would stress that we first construed the critical words in §40.1-7 without reliance on the amendment. Our interpretation is not based upon the amendment but upon our own analysis of the present statute; we have cited the amendment in an a posteriori manner simply to show that it is consistent with our analysis.

[10] We have carefully considered the brief of the amicus, which places great reliance on the language of §16-24-1 of the General Laws (quoted at page 6 supra). It is our opinion, however, that the subsequent specific provisions of §40.1-7 must control to the extent that they are at all inconsistent with the general language of §16-24-1.

for the 1975-76 school year and agreed to pay up to an amount substantially in excess of the per pupil cost for the 1976-77 school year.[11] We conclude that the School Committee has thereby agreed to pay the per pupil cost for the 1977-78 school year. Therefore, we find that the School Committee has paid and has agreed to pay that amount which it is required by law to pay toward the cost of Thomas's education and related services in the Day Hospital Program at Bradley Hospital.[12]

Accordingly, the appeal is denied.

/s/ William P. Robinson
Associate Commissioner of
Education

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[11] See Finding #5 and footnote 4.

[12] The appellants have also asserted that they are not required to pay MHRH any amount for the services provided to Thomas. Their argument in this regard is based on various federal statutes and regulations and, ultimately, on the Supremacy Clause of the United States Constitution (Art. VI, Para. 2). This issue, however, is not within our jurisdiction on this appeal.

Approved: /s/ Thomas C. Schmidt
Commissioner of Education

April 17, 1978

**ANSWER OF STATE DEFENDANTS WILLIAM ROBINSON, THOMAS SCHMIDT, AND THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION (MAY 31, 1978)**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[Title omitted in printing]

ANSWER OF WILLIAM ROBINSON, ASSOCIATE RHODE ISLAND COMMISSIONER OF EDUCATION, THOMAS SCHMIDT, RHODE ISLAND COMMISSIONER OF EDUCATION, AND THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION.

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted

SECOND DEFENSE

Defendants possess immunity and good faith immunity to this action.

THIRD DEFENSE

Defendants admit paragraphs 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the complaint. Defendants deny paragraphs 17 and 21 of the com-

plaint. Defendants aver that they are without sufficient information to form a belief as to the validity of the allegations contained in pararagraphs 18 and 19 of the complaint. Paragraphs 2, 13, 14, 16 and 20 contain conclusions of law to which no answer is required, but to the extent that these paragraphs contain any allegations of fact, they are denied.

FOURTH DEFENSE

In regard to paragraph 1 of the complaint, defendants admit that plaintiffs are residents of Cumberland, Rhode Island and that Thomas F. Smith, III was born on February 28, 1968. Defendants admit that Thomas Smith is handicapped physically and mentally and that Thomas Smith suffers from cerebral palsy, but defendants aver that they are without sufficient information to form a conclusion as to the etiology of Thomas Smith, III's mental disability. Defendants deny that Thomas has been unable to obtain

the "advantages and opportunities of education". Defendants admit that Thomas is in need of "special education and related services".

FIFTH DEFENSE

In regard to paragraph 2 of the complaint, defendants admit the same but answer further that in accordance with defendant Robinson's opinion, MHRH has responsibility in this case.

SIXTH DEFENSE

In regard to paragraph 12 of the complaint, defendants deny that the associate Commissioner was not an impartial hearing officer or that any federal law required him to recuse himself. Defendants admit the other allegations contained in paragraph 12 of the complaint.

SEVENTH DEFENSE

In regard to paragraph 15 of the complaint, defendants admit that on April 17, 1978, the Associate Commissioner made a

decision on the merits and that plaintiff received the same on April 25, 1978. Defendants admit that the portions of the decision found in paragraph 15 are quoted correctly. Defendants deny any other allegations or conclusions of law to be found in prargraph 15 of the complaint.

EIGHTH DEFENSE

In regard to paragraph 16 of the complaint defendants admit that a state plan has been submitted and that federal funds have been received. Defendants deny any other allegation or conclusion of law to be found in paragraph 16 of the complaint.

By their Attorney:

JULIUS C. MICHAELSON
ATTORNEY GENERAL

By: /s/
FORREST L. AVILA
Special Assistant
Attorney General
56 Pine Street
Providence, Rhode Island
02903

May 31, 1978.

[Certificate of Service omitted in printing]

**OPINION: CERTIFICATION OF TWO QUESTIONS TO THE SUPREME COURT OF RHODE ISLAND (DEC. 22, 1978)**

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR., URSULA J. SMITH, et al. | ) | |
| v. | ) | C.A. No. 76-0510 |
| CUMBERLAND SCHOOL COMMITTEE, WILLIAM P. ROBINSON, JR., et al | ) | |

OPINION

PETTINE, Chief Judge. Plaintiffs, a ten year old multihandicapped boy and his parents, contend that Rhode Island state and federal law require that the Cumberland School Committee provide plaintiff Thomas F. Smith, III, with free education adequate to address his special physical and emotional needs.

There is no disagreement as to the essential facts in this case. Thomas suffers from physical handicaps and is emotionally

handicapped and/or disturbed. The Cumberland School Committee's own educational programs failed to satisfy Thomas' particular needs. The School Committee initially provided partial funding for the transfer of Thomas to the Day Hospital Program at Bradley Hospital; all agree that this program is appropriate for Thomas. The parties disagree, however, as to who is responsible for financing the special education and related services for Thomas at Bradley Hospital.

On an appeal from an administrative decision, the Rhode Island Commissioner of Education decided that the state's Department of Mental Health, Retardation and Hospitals (MHRH) was responsible for funding and providing the necessary services for Thomas. This has long been the position of the defendant Cumberland School Committee. However, the state defendants (representing MHRH) and the plaintiffs argue that the local school board must fund such an educational program.

The plaintiffs are particularly concerned due to the significant limitations and restrictions that must be complied with before the MHRH is required to provide funding. Local school boards do not operate under similar restrictions. The plaintiffs attack the Commissioner's legal conclusions as erroneous interpretations of the various Rhode Island statutes and regulations dealing with the education and treatment of handicapped children. Plaintiffs argue that such statutory construction violates federal law and premise this action on 42 U.S.C. §1983 and 28 U.S.C. §§1331, 1343.

The State defendants have requested that this Court abstain from deciding the state-law issues in this case and certify a question concerning the disputed construction of the state law to the Rhode Island Supreme Court. After reviewing the Rhode Island statutory and regulatory framework in question, this Court agrees that certification is proper and appropriate.

R.I.G.L. §16-24-1 places a duty upon the local school committee to provide special education for any child who is "either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented." The school committee of the town shall "provide such type of special education that will best satisfy the needs of the handicapped child, as recommended and approved by the state board of education in accordance with its regulations."

This "special education" includes "educational facilities, materials, evaluative services, therapeutic services, and instruction which are especially designed and operated by personnel with special educational qualifications, to meet the particular needs of exceptional handicapped children."

The most recent regulations, promulgated pursuant to §§16-24-1 and 16-24-2, effective October 1, 1977, erect guidelines under which

the local school board must operate. These regulations define handicapped children for the purposes of §16-24-1. This definition includes all children who are "behaviorally disordered" and that term is intended to include both "emotional handicap and emotional disturbance." For these emotionally handicapped and disturbed children, the local school boards have the responsibility to establish and provide "for free education of all resident handicapped children." If the local school board decides not to establish their own special education program, it shall provide the free education "in other special education programs approved by the Commissioner of Education."

There is no dispute that plaintiff child is either emotionally disturbed or emotionally handicapped and, thus, "handicapped" for the purposes of §16-24-1. The Cumberland School Committee also does not dispute that their own educational programs could not meet

plaintiff's needs. The Day Hospital Program at Bradley Hospital has furnished adequate services to fulfill educational needs and has been approved by the Commissioner of Education pursuant to the regulations. Therefore, if one focuses solely upon §16-24-1 and its accompanying regulations, the plaintiffs' argument that the local school committee is responsible for providing Thomas a free and appropriate education appears convincing.

The plaintiffs' argument is strengthened by the fact that Rhode Island has been receiving federal funds under The Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq. and must comply with the mandates of that Act. Under the Act, Rhode Island must develop a plan whereby "a free appropriate public education will be available for all handicapped children within the State not later than September, 1978...." 20 U.S.C. §1412(2)(B). There seems little doubt that the child qualifies as "handicapped" under 20

U.S.C. §1401(1). Because the state statute, §16-24-1, provides for free special education for such handicapped children, it appears to dovetail with the requirements of the federal act. In an effort to insure that federal and state law comport with each other, this Court is tempted to apply §16-24-1 to the present action. Despite these appealing arguments for the application of §16-24-1, another state statute seriously clouds the issue.

Rhode Island law also requires that the state take responsibility, through the MHRH department, for the "development of specialized services for the care and treatment of emotionally disturbed children." R.I.G.L. §40.1-7. Care and treatment is defined as:

> medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular or special education programs under the jurisdiction of the board of regents for education.

R.I.G.L. §40.1-7-4 (emphasis added).

This state statute places only a limited responsibility upon the state and the MHRH. Under R.I.G.L. §40.1-7, alternative sources of funding, including the income of parents and insurance proceeds, must be found inadequate before MHRH is required to expend funds. Further MHRH is under no duty to pay for the treatment of eligible children if such payment will exceed the amount appropriated to the Department. In short, the treatment provided by MHRH is not necessarily free; nor is it available if the payment would require the Department to incur a deficit. See Roe v. Affleck, No. 77-76 Appeal (R.I. 8/16/78) (deciding question certified by this Court); In re John Doe, A Juvenile, No. 78-110 M.P. (R.I. 8/31/78). Due to these limitations, plaintiffs argue that §40.1-7 must not be applied because if fails to comport with the standards of the federal Education for All Handicapped Children Act.

On the appeal from the administrative hearing, the Commissioner of Education examined both §16-24-1 and §40.1-7 and found the latter section controlling. He concluded that MHRH was responsible for Thomas' education at Bradley Hospital. To reach this decision the Commissioner apparently viewed §40.1-7 as overlapping and overriding some portions of §16-24-1 and construed the exception clause in §40.1-7-7 narrowly. According to the Commissioner, not all the "other special education programs approved by the Commissioner of Education" pursuant to §16-24-1 qualify under the §40.1-7-7 exemption as "special education programs under the jurisdiction of the board of regents for education." The Commissioner reasoned that merely because the program at Bradley Hospital has been approved by the Commissioner of Education, it is not automatically under "the jurisdiction" of the Board of Regents. The Commissioner concluded "that

the reference in §40.1-7 to 'those regular or special education programs under the jurisdiction of the board of regents for education' means in effect those programs under the control and management of the school committee." Therefore, the MHRH was deemed to have responsibility for those other, independent education programs that were approved by the Commissioner under §16-24-1 but were not under the control or management of the school committee. In other words, the Commissioner construed the state statutes not as addressing two discrete situations, but as overlapping; and in the areas of overlap, the MHRH was to assume responsibiltiy.

Therefore, the critical issue in this case is the relation between the exclusionary phrase of §40.1-7-7 -- "special education programs under the jurisdiction of the board of regents for education" -- and the §16-24-1 regulations that require the local school board to provide, free of charge, its own

educational programs or "other special educational programs approved by the Commissioner of Education." The critical issue revolves around the answers to two questions:

> 1. If the educational programs organized and/or managed by a local school committee fail to provide adequate special education for a resident handicap, do the applicable regulations promulgated pursuant to R.I.G.L. §§16-24-1, 16-24-2 require the school committee to provide free education in another "special education program approved by the Commissioner of Education"?
>
> 2. If so, are those "other special education programs" that are approved by the Commissioner of Education pursuant to §16-24-1 "special educational programs under the jurisdiction of the board of regents for education" as defined in R.I.G.L. §40.1-7-7?

These questions cannot be easily answered from the text of the various statutes and regulations. The term "under the jurisdiction of the board of regents for education" can be construed broadly as including all the programs suggested in the regulations passed pursuant to §16-24-1 and

§16-24-2. Or, it may be construed narrowly, as it was by the Commissioner of Education, to mean only those special educational programs under the actual control and management of the school committee.

Depending upon the interpretation of this legislative and regulatory maze, federal constitutional questions may arise. If the statutes cannot be interpreted to conform with federal regulatory requirements, the Supremacy Clause of the Constitution dictates finding such non-conforming law violative of the federal statutory scheme. However, before reaching this federal claim, this Court should allow the state court to construe these state statutes which are open to several interpretations, some of which avoid a conflict with federal law. See Railroad Commission of Texas v. Pullman Co., 312 U.S. 196 (1940). As the United States Supreme Court has noted:

> Among the cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law. If the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim, the argument for abstention is strong.
>
> Harris County Comm'rs Court v. Moore, 420 U.S. 77, 84 (1975).

See also Lake Carriers Association v. MacMullen, 406 U.S. 498 (1972).

This Court is aware of the delay that the certification process entails. The state law question facing this Court, however, is a serious and open one. The Rhode Island Supreme Court has not reached the question of the respective "jurisdictions" or responsibilities of the MHRH and the local school boards; however, it has stressed the complexity of the issue:

> The right of the plaintiff in this case to be placed in a facility at the expense of MHRH is simply not clear.... It is unclear with whom the ultimate responsibility of providing for Diane rests: MHRH or the City of Cranston.

> These are questions of great import to this case and should be properly raised.... Although we sympathize with the Giacominis' plight, the complexity of the issues raised by their case simply precludes the type of relief granted by the trial justice.
>
> Giacomini v. Bevilacqua, 374 A.2d 66 (1977).

Not only is the question complex and unanswered, but its resolution will have far reaching effects throughout the state. In such situations, certification of the question to the State Supreme Court is likely to avoid the possibility of unnecessary friction in state-federal relations. See Railroad Commission of Texas v. Pullman Co., 312 U.S. 196, 199 (1940). Further, plaintiffs already enjoy preliminary injunctive relief; therefore, "the delays inherent in the abstention process" will not endanger any of plaintiffs' "valuable federal rights." Harris County Comm'rs Court v. Moore, supra at 83.

This Court is not persuaded by the arguments of amicus curiae against abstention. Amicus curiae correctly notes that state decisions have clearly and rigorously limited the financial responsibilities of the MHRH. See, e.g., Roe v. Affleck, supra. Yet, these decisions do not address the issue of whether an emotionally disturbed child seeking special eduction is the responsibility of the MHRH or the local school board; nor do the decisions detail the contours of the local school board's responsibilities or "jurisdiction."

The two questions specified in this opinion must be certified to the Rhode Island Supreme Court in the interests of comity and in order to avoid unnecessary adjudication of constitutional and federal claims. The two questions are hereby certified and the State defendants' motion is granted. An order and certification will be prepared by the defendants as required by Rhode Island Supreme Court Rule 6, as amended.

/s/ Raymond J. Pettine
Chief Judge

December 22, 1978

**ORDER OF CERTIFICATION SUBMITTING CERTAIN QUESTIONS OF STATE LAW TO THE HONORABLE SUPREME COURT OF THE STATE OF RHODE ISLAND FOR DETERMINATION (JAN. 16,1979)**

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

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| THOMAS F. SMITH, JR., URSULA J. SMITH, et al | ) | |
| | ) | C.A. No. |
| vs. | ) | 76-0510 |
| CUMBERLAND SCHOOL COMMITTEE, WILLIAM P. ROBINSON, JR., et al | ) | |

ORDER OF CERTIFICATION SUBMITTING CERTAIN QUESTIONS OF STATE LAW TO THE HONORABLE SUPREME COURT OF THE STATE OF RHODE ISLAND FOR DETER-
DETERMINATION

There having arisen in the above-entitled matter serious and open questions of state law which may be determinative of the case and the resolution of which will have far reaching effects throughout the State of Rhode Island, the Federal District Court for the District of Rhode Island, in the interests of comity and in order to avoid unnecessary adjudication of constitutional and

federal claims hereby certifies, to the Rhode Island Supreme Court, pursuant to Supreme Court Rule 6, the following questions of state law:

1) If the educational programs organized and/or managed by a local school committee fail to provide adequate special education for a resident handicapped child, do the applicable regulations promulgated pursuant to R.I.G.L. S. 16-24-1, 16-24-2 require the school committee to provide free education in another "special education program approved by the Commissioner of Education"?

2) If so, are those "other special education programs" that are approved by the Commissioner of Education pursuant to S. 16-24-1 "special education programs under the jurisdiction of the board of regents for education" as defined in R.I.G.L. S. 40.1-7-7?

A statement of all the facts relevant to the above certified questions which shows fully the nature of the controversy in which the question arose is contained in the annexed opinion of this Court.

So Ordered.

* * *

Enter:

/s/ Raymond J. Pettine
Chief Judge

Jan. 16, 1979

**ORDER: MODIFICATION OF THE PRELIMINARY INJUNCTION SO AS TO REQUIRE DEFENDANTS TO MAINTAIN PLAINTIFF THOMAS F. SMITH III IN THE SPECIAL EDUCATION PROGRAM AT HARMONY HILL SCHOOL (JULY 10, 1979)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR.<br>URSULA J. SMITH, Parents<br>Guardians and Next Friends<br>of Thomas F. Smith, III<br>and THOMAS F. SMITH, III | : | |
| VS | : | C.A. NO.<br>76-0510 |
| CUMBERLAND SCHOOL COMMITTEE,<br>WILLIAM P. ROBINSON, JR.,<br>Associate Rhode Island Commissioner of Education, THOMAS SCHMIDT, Rhode Island Commissioner of Education, THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION, and DR. JOSEPH BEVLACQUA, Director of Rhode Island Department of Mental Health, Retardation and Hospitals | : | |

O R D E R

This matter having come before the Court on plaintiffs' Motion To Modify Preliminary Injunction, and the parties having agreed in chambers that said motion be granted,

IT IS HEREBY ORDERED;

1. Said motion be and hereby is granted, and the defendant, Cumberland School Committee, is hereby preliminarily enjoined, until further order of this Court, to maintain the minor plaintiff, Thomas F. Smith, III, in the day program of special education at Harmony Hill School.

2. This order is without prejudice to any of the said defendant's rights with regard to the merits of the underlying controversy of its responsibility to fund such a placement viz a viz the responsibility of the Rhode Island Department of Mental Health, Retardation and Hospitals.

ENTER: /s/ Raymond J. Pettine
Chief Judge
July 9/79

* * *

**OPINION OF THE SUPREME COURT OF RHODE ISLAND: CERTIFIED QUESTIONS ANSWERED AFFIRMATIVELY IN FAVOR OF PLAINTIFFS (JUNE 3, 1980)**

SUPREME COURT OF RHODE ISLAND

Thomas F. Smith, Jr., et al.

v.

Cumberland School Committee, et al.

No. 79-22-Appeal.

June 3, 1980.

OPINION

DORIS, Justice

The United States District Court for the District of Rhode Island has certified to this court two questions of law that require us to decide whether a school committee or the Department of Mental Health, Retardation and Hospitals (MHRH) must bear the cost of providing special education for handicapped children.

The facts underlying this litigation are not in dispute. Thomas Smith, a twelve-year-old multihandicapped child, and his parents reside in Cumberland, Rhode Island. Due to Thomas's physical and emotional handicaps, the regular programs offered in the Cumberland school system do not meet his particular educational needs. Since December 1975, therefore, Thomas has been enrolled in the Day Hospital Program at Bradley Hospital, which, the parties agree, provides him with an appropriate education. The Cumberland School Committee (school committee) partially funded the tuition for this program for approximately one year following Thomas's enrollment.[1] In November 1976, however, the superintendent of schools informed plaintiffs that MHRH, not the school committee, was responsible for providing Thomas's special education. The school committee unanimously

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1. The annual tuition for this program is $18,000.

upheld the superintendent, concluding that G.L. 1956 (1977 Reenactment) §§ 40.1-7-1 to -9 dictated that the education and care of Thomas were the responsibility of MHRH. The plaintiffs appealed the decision of the school committee to the associate commissioner of education, who held that MHRH must provide the special education and related services and that the school committee must contribute to MHRH only the "per pupil cost" as its share of the services provided to Thomas.

The plaintiffs petitioned the Family Court for an order that the school committee continue to finance Thomas's special education. The Family Court dismissed the action for want of jurisdiction. The plaintiffs then commenced a civil action in Superior Court seeking the same relief. The court dismissed this action on the ground that plaintiffs had not exhausted their administrative remedies. The plaintiffs then filed

a third action in the United States District Court for the District of Rhode Island seeking a mandatory injunction ordering the school committee to continue funding Thomas's special education. The District Court found that G.L. 1956 (1969 Reenactment) § 16-24-1, which requires local school committees to provide a special education for handicapped children, and G.L. 1956 (1977 Reenactment) §§ 40.1-7-1 to -9, which establish within MHRH a program for emotionally disturbed children, both dealt with educating handicapped children. Because of the apparent statutory conflict, the District Court chose to abstain from deciding the case in order that this court might be allowed an opportu;nity to construe the statutes.[2] Accordingly, the District Court certified to this court pursuant to Sup.Ct. Rule 6 the following two

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2. Prior to this decision, the United States District Court had ordered the school committee to continue funding Thomas's education at Bradley Hospital until his appeal was concluded.

questions:

> "1. If the educational programs organized and/or managed by a local school committee fail to provide adequate special education for a resident handicapped child, do the applicable regulations promulgated pursuant to R.I.G.L. S. 16-24-1, 16-24-2 require the school committee to provide free education in another 'special education program approved by the Commissioner of Education'?
>
> "2. If so, are those 'other special education programs' that are approved by the Commissioner of Education pursuant to S. 16-24-1 'special education programs under the jurisdiction of the board of regents for education' as defined in R.I.G.L. S. 40.1-7-7?"

We note at the outset that the statutes serve different purposes: § 16-24-1 is by its terms educational in nature, while §§ 40.1-7-1 to -9 have a primarily therapeutic purpose, though they include a provision for educational services. Pursuant to § 16-24-1, a school committee has an affirmative obligation to provide the type of special education that will best satisfy the needs of a resident handicapped child whose mental retardation or physical or emotional handicap

prevent his normal educational growth and development.[3] Though the predecessor to this statute was enacted in 1952, § 16-24-1 must be viewed in the context of the Education for All Handicapped Children Act of 1975 (the Act), 20 U.S.C.A. §§ 1401-1461 (West 1978). The Act is a funding vehicle through which the federal government channels money to the states to provide full educational opportunities to handicapped children. Loughran v. Flanders, 470 F.Supp. 110, 113 (D.Conn. 1979). To be eligible for these federal funds, a state must comply with a number of

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3. General Laws 1956 (1969 Reenactment) § 16-24-1 provides:

> "Duty of school committee to provide special education. -- In any city or town where there is a child within the age range as designated by the regulations of the state board of education, who is either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented, the school committee of such city or town shall provide such type of special education that will best satisfy the needs of the handicapped child, as recommended and approved by the state board of education in accordance with its regulations."

conditions, such as establishing a policy that assures all handicapped children of a right to a free appropriate public education, developing a plan to implement the policy of providing a full educational opportunity to all handicapped children, and establishing certain procedural safeguards to protect the rights of handicapped children.[4] Additionally, the local educational agency[5] in each

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4. 20 U.S.C.A. § 1412(1), (2), (5) (West 1978). A "'free appropriate public education'" is defined as:
"special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involed, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U.S.C.A. § 1401(18) (West 1978).

5. A "'local educational agency'" is:
"a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such

state must establish and annually revise an individualized education program[6] for each handicapped child.

The Board of Regents for Education must comply with the federal requirements because the state receives federal funds under the

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term also includes any other public institution or agency having administrative control and direction of a public elementay or secondary school." 20 U.S.C.A. § 1401(8) (West 1978).

6. An "'individualized education program'" is defined as:

"a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." 20 U.S.C.A. § 1401(19) (West 1978).

Act. It is evident from the regulations adopted by the board of regents pursuant to § 16-24-2 that the regents have attempted to conform to the Act by making our existing educational system for handicapped children provide special educational services in the manner envisioned by the Act. Under the Act, it is the responsibility of the local educational agency to administer the special education programs. Consistent with this requirement, the regulations adopted by the board of regents require the school committees to provide a free special education for handicapped children either through their own programs or through other private special education programs approved by the Commissioner of Education.[7] In the event that the

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7. Regulations of the board of regents governing the Special Education of Handicapped Children § 1, Art. III(1). The regulation provides:

> "Responsibility--The school committee of each school district shall establish within its school district the special educaiton required by these regulations and/or it shall provide for the free education of all resident handicapped

established local educational programs fail to provide an adequate special education for a handicapped child, the regulations of the board of regents would thus require the school committee to "provide for the free education * * * through * * * other special education programs approved by the Commissioner of Education."

The statutory program created within MHRH by G.L. 1956 (1977 Reenactment) §§ 40.1-7-1 to -9 to provide services for emotionally disturbed children relieves the school committee of its obligation to educate handicapped children only in certain limited circumstances. As we stated earlier, this program has a primarily therapeutic purpose of providing "psychiatric care and treatment" to emotionally disturbed children. The educational services to which a child might be

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children either through these programs or in other special education programs approved by the Commissioner of Education."

entitled as part of his "care and treatment" are thus incidental to the medical and psychiatric services he receives. We believe that the Legislature incorporated a provision for educational services into the definition of "care and treatment" to ensure that an emotionally disturbed child would continue to receive educational services while being treated in the MHRH program. We have previously held that MHRH has only a contingent obligation to provide educational services to handicapped children. The child must first be "emotionally disturbed," which requires that he "be in need of psychiatric care and treatment." G.L. 1956 (1977 Reenactment) § 40.1-7-4(5). If the child is not in need of such treatment, he is not "emotionally disturbed" and is not eligible for the MHRH program. See Naughton v. Goodman, 117 R.I. 113, 117-18, 363 A.2d 1345, 1348 (1976). Secondly, even if a child is eligible for the program, he is not thereby guaranteed treat-

ment. The availability of all benefits under the program is limited by the funding the program has received. When the appropriated funds are exhausted, MHRH need not provide any "care and treatment" or educational services, regardless of a child's eligibility or need for them. Roe v. Afflect, R.I., 390 A.2d 361, 368 (1978). In such a situation the director of MHRH fulfills his responsibility to the eligible handicapped children by placing their names on a waiting list until such time as there are sufficient funds to pay for their care and treatment. See In re Doe, R.I., 390 A.2d 390, 395-96 (1978).

Once an emotionally disturbed child is admitted to the MHRH program, the educational services available as part of the "care and treatment" are further limited by statute in that "care and treatment" includes only "those educational services furnished to a child other than those regular or special education programs under the jurisdiction of

the board of regents for education." G.L. 1956 (1977 Reenactment) § 40.1-7-4(1) (Emphasis added). The emphasized language -- the exclusionary phrase -- quite clearly excludes from the definition of care and treatment those educational services that are under the jurisdiction of the regents. We believe that the exclusionary phrase was intended to prevent MHRH from duplicating the educational services that are provided through programs under the jurisdiction of the regents. The statute, however, does not define "the jurisdiction of the board of regents." In order to conform with the therapeutic purpose of §§ 40.1-7-1 to -9, we believe that we must construe the jurisdiction of the regents to include those private special education programs which, at public expense, provide the educational services that a school committee, though obliged to provide, is unable to offer because it lacks the requisite facilities or expertise to accommodate the unique needs of

a handicapped child. To rule otherwise could require MHRH to devote a substantial portion of its resources to providing special education services, which would effectively frustrate the therapeutic purpose of the program by decreasing the funds available for providing psychiatric services. Accordingly MHRH is not in the first instance obliged to finance a handicapped child's special education in a private program; that obligation belongs solely to the school committees. What obligation MHRH has to provide educational services is very limited and it complements rather than supplants the obligation of the school committees under § 16-24-1.

The obligation of MHRH to provide special education services arises when the services that the school committee must provide are no longer accessible to an emotionally disturbed child as a consequence of the "psychiatric care and treatment" he is

receiving in the MHRH program. We wish to emphasize that a municipality may not render special education programs "inaccessible" -- thus shifting the responsibility to MHRH -- simply by choosing not to create or to finance them. On the contrary, a school committee must either establish its own programs or provide for achild's special education in a private program. The determinative factor is whether a child's placement and treatment in the MHRH program would deprive him of his access to the existing public or private special education programs or would cause him to be absent from those programs to such an extent that this educational growth and development would be impaired. If either situation occurs, then MHRH must assume the responsibility of educating the child, and this responsibility continues until such time as the child either leaves the MHRH program or is able to resume his education in the program existing under the jurisdiction of the regents.

This construction of § 40.1-7-4(1) ensures that an emotionally disturbed child who no longer has access to either a regular or special education program because of his "psychiatric care and treatment" in the MHRH program will nonetheless not be deprived of his educational opportunities while being treated. The obligation of MHRH to provide special education services is thus very limited. Contrary to the opinion of the associate commissioner, §§ 40.1-7-1 to -9 do not impose on MHRH the responsibility of educating all emotionally handicapped children, nor do they relieve a school committee of its responsibility under § 16-24-1 as the primary provider of special educational services.

It is our opinion, therefore, that the answer to the first question must be in the affirmative.

Another exclusionary phrase nearly identical to the one in the definition of

"care and treatment" appears in § 40.1-7-7, which deals with the contributions that each community must make to MHRH as the community's share of the cost of educational services provided by MHRH to emotionally disturbed children. Prior to July 1, 1979, § 40.1-7-7 had provided:

> "Each community * * * shall contribute to the department, [MHRH] * * * its average per pupil cost for education * * * as its share of the cost of the educational services furnished to emotionally disturbed children in programs other than those regular class or special education programs under the jurisdiction of the board of regents for education." (Emphasis added).

The second certified question asks us to determine whether "other special education programs," such as the one at Bradley Hospital, are "special education programs under the jurisdictiion of the board of regents," as defined in § 40.1-7-7. In light of our prior construction of "jurisdiction" in § 40.1-7-4(1), it would seem that we should again construe the term to include these pro-

grams. Since the District Court has certified the questions to us, however, the Legislature has amended § 40.1-7-7. The statute now reads:

> "Each community * * * shall contribute to the department, * * * its average per pupil cost for special education * * * as its share of the cost of the educational services furnished to emotionally disturbed children in programs other than those regular class or special education programs under the control and management of the school committee." G.L. 1956 (1977 Reenactment) § 40.1-7-7 as amended by P.L. 1976, ch. 130, § 4. (Emphasis added).

Because the statute has been amended, what we must now determine is whether the "other special education programs" referred to in the question are "special education programs under the control and management of the school committee." We believe that they are.

It is our opinion that a construction of "control and management" that includes both those programs administered directly by the the school committee as well as those private programs in which the committee has placed

handicapped children is the only construction of the exclusionary phrase that comports with the purpose of § 40.1-7-7. The language of § 40.1-7-7 indicates that the statute has a compensatory purpose. As we stated in answering the first question, the obligation of MHRH to educate a handicapped child arises only after the child has been admitted to the MHRH program and no longer has access to the programs provided by the school committee. To the extent that MHRH then provides educational services for handicapped children, a need for compensation exists because of these occasions MHRH must bear the costs of education that otherwise would have been borne by the school committee, pursuant to G.L. 1956 (1969 Reenactment) §§ 16-24-1 and 16-24-2. Recognizing that there is no need for a community to reimburse MHRH for educational services that the community already provides, the Legislature incorporated into § 40.1-7-7 an exclusionary phrase which relieves a

community of its duty to contribute to MHRH for those educational services offered in programs "under the control and management of * * * [its] school committee." In light of the compensatory nature of the statute, it makes little sense to us to construe "control and management" in such a manner that we would distinguish between special education programs administered directly by the school committee and private special education programs in which the school committee has placed resident handicapped children whose special needs have not been met by the committee's existing programs. From a financial standpoint there is little to differentiate the two types of programs. The school committee must bear the cost of providing a special education regardless of the naure of the program in which the child receives it. In addition, the school committee retains a significant degree of control over the content of the educational

services provided in a private program because the regents' regulations and the Act require that a representative of the committee participate in the formulation of the child's individualized education program.

The central issue in determining whether § 40.1-7-7 applies is whether a community, through its school committee, has paid for the educational services that have been provided to a handicapped child. If it has, then the exclusionary phrase relieves it of is obligation to contribute to MHRH. If the child has received the necessary educational services from the MHRH program, then the exclusionary phrase does not apply and the community must contribute its average-per-pupil cost for special education to MHRH.

We believe that the Legislature amended the exclusionary phrase in § 40.1-7-7 in order to make the statue more precise, not to diminish its scope. An examination of the Act in which the Legislature amended § 40.1-

7-7 shows that the Legislature contemporaneously extended the applicability of the regents' regulations to the educational services offered by MHRH. Public Laws 1976, ch. 130, § 6 (amending G.L. 1956 (1969 Reenactment) § 16-24-2). The replacement of the phrase "jurisdiction of the board of regents" with a more precise phrase was necessary to avoid a construction of the statute that would place MHRH under the jurisdiction of the regents or purposes of § 40.1-7-7 simply because its educational program was subjecct to the regents' regulations. Such a construction of the statute would have brought the MHRH program within the ambit of the exclusionary phrase, resulting in a situation in which the contributions to MHRH, if any, would not reflect the costs incurred by MHRH in providing special educational services to emotionally disturbed children. We will not ascribe such an improbable intent to the

Legislature. Berthiaume v. School Committee of Woonsocket, R.I., 397 A.2d 889, 892 (1979). It is our opinion that the Legislature amended § 40.1-7-7 with the intention of clarifying the somewhat opaque language of the exclusionary phrase. We perceive nothing in the amending act that indicates an intent to affect the obligation of communities to reimburse MHRH for a portion of the costs incurred by that department in providing educational services to emotionally disturbed children. For these reasons, the answer to the second certified question must also be in the affirmative.

**SECOND AMENDED AND SUPPLEMENTAL COMPLAINT (SEPT. 16, 1980)**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR., URSULA J. SMITH, Parents Guardians and Next Friends of Thomas F. Smith, III, and THOMAS F. SMITH, III | : | |
| VS | : | C.A. No. 76-0510 |
| CUMBERLAND SCHOOL COMMITTEE, WILLIAM P. ROBINSON, JR., Associate Rhode Island Commissioner of Education, THOMAS SCHMIDT, Rhode Island Commissioner of Education, THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION, and JOHN E. McMANUS, Director of Rhode Island Department for Children and their Families | : | |

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT

PREAMBLE

This action arises under the Constitution and laws of the United States, more specifically, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, the

Education of the Handicapped Act (20 U.S.C. § 1401, et seq.), and the Rehabilitation Act of 1973, Section 504 (29 U.S.C. § 794). It is brought to secure to the minor plaintiff his right to a free, appropriate education, suited to his special needs as a handicapped child and his right not to be deprived of said education except by due process of law.

This is an appeal from a final decision of the Rhode Island state education agency which adversely effects the plaintiffs. This Court has subject-matter jurisdiction under 20 U.S.C. §§ 1415(e)(2) and 1415(e)(4) without regard to the amount in controversy.

Administrative remedies having been exhausted, this Court has jurisdiction, over those claims which are based upon discrimination by the defendants against the minor plaintiff because of his handicapping conditions, under 31 U.S.C. §1244.

The amount in controversy exceeds $10,000.00 exlusive of interest and costs.

This Court has subject-matter jurisdiction under 28 U.S.C. §1331. Declaratory relief is proper pursuant to 28 U.S.C. §§2201 and 2202.

Defendants have attempted to deprive the minor plaintiff of rights secured him by the Constitution and laws of the United States under color of Rhode Island law. A cause of action is therefore created by 42 U.S.C. §1983, and jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) without regard to the amount in controversy.

PARTIES

1. Plaintiffs, THOMAS F. SMITH, JR., and URSULA J. SMITH are husband and wife, residents of Cumberland, Rhode Island and parents of Thomas F. Smith, III. THOMAS F. SMITH, III (hereinafter "Tommy") is a minor child, born February 28, 1968, who is and has been at all times mentioned herein, handicapped physically and mentally because of the effects of cerebral palsy which has affected him since birth. He is an "otherwise quali-

fied handicapped individual" as provided in 29 U.S.C. §794. As a result of his handicaps, he has been unable to obtain the advantages and opportunities of education and is in need of "special education" and "related services" as those terms are defined in 20 U.S.C. §§1401(16) and 1401(17), respectively, and in 45 C.F.R. §§121a.14 and 121a.13, respectively.

2. The defendant, CUMBERLAND SCHOOL COMMITTEE, (hereinafter "the School Committee") is the Rhode Island local educational agency (LEA) which is directly responsible for providing special education and related services, without cost, appropriate to Tommy's needs as a handicapped child.

3. The defendant, WILLIAM P. ROBINSON, JR. is the Associate Rhode Island Commissioner of Education, (hereinafter "the Associate Commissioner") and the person who has had, at all times mentioned herein, the responsibility to review decisions of the

LEA's in Rh de Island, and render decisions on behalf of the Rhode Island Department of Education. The Rhode Island Department of Education (hereinafter "the SEA") is the state educational agency for the State of Rhode Island. The Associate Commissioner is an employee of the SEA, with various and sundry duties, other than acting as a hearing officer for appeals regarding matters of special education from the LEA's in Rhode Island.

4. The defendant, THOMAS SCHMIDT, is the Rhode Island Commissioner of Education (hereinafter "the Commissioner") and the person designated by Rhode Island law with the responsibility to hear appeals regarding matters of special education from the LEA's in Rhode Island. He has delegated his responsibility and his attendant powers and duties to the Associate Commissioner.

5. The defendant, RHODE ISLAND BOARD OF REGENTS FOR EDUCATION (hereinafter "the

Board of Regents") is the organ of Rhode Island government which has the power to adopt policies and procedures with regard to the substantive and procedural rights of handicapped children who reside within the State of Rhode Island. It has general supervisory powers over the educational process within the State of Rhode Island and the duty to enforce the provisions of all laws relating to said educational process.

6. The defendant, JOSEPH E. McMANUS, is the Director of the Rhode Island Department for Children and their Families, (hereinafter "DCF") and according to the decision of the Associate Commissioner, the Rhode Island Department of Mental Health, Retardation and Hospitals (MHRH) is responsible for Tommy's education. The program referred to by the Associate Commissioner in his decision was under the aegis of MHRH when said decision was rendered but is currently under the jurisdiction of DCF, having been transferred

there by R.I.P.L. ch248 §1. The said defendant is joined herein so that he may be fully informed and take such part herein as he may desire, so that complete relief may be afforded between the parties, and a multiplicity of actions avoided.

COUNT I

7. By letter dated November 5, 1976, a copy of which is annexed hereto as Exhibit A, the Cumberland Superintendent of Schools informed of Tommy's parents that while he agreed Tommy's placement in a program at Emma Pendleton Bradley Hospital, licensed by the SEA as a special education program for emotionally handicapped children:

> "...provides a program of treatment and education which is appropriate and suitable for Thomas and has proved beneficial to him."

it was his position that:

> "...his (Tommy's) education and care are the responsibility of the Division (Department) of Mental Health, Retardation and Hospitals." (Now DCF)

8. Plaintiffs timely appealed the Superintendent's decision, pursuant to the applicable provisions of the Board of Regents - Regulations Education Handicapped Children (hereinafter "State Regulations"), to the School Committee, and on January 20, 1977 a hearing was conducted before the said School Committee on the issue of whether the School Committee or MHRH (now DCF) had the responsibility to provide further funding of Tommy's placement in the program at Bradley Hospital.

9. Immediately after the hearing concluded, the School Committee voted unanimously to uphold its Superintendent of Schools and in effect told Tommy and his parents that it had no responsibility to provide him with a free, appropriate education since it felt he was "emotionally disturbed" and therefore the responsibility of MHRH (now DCF).

10. On February 10, 1977, the School Committee rendered a written decision. A

copy of this decision is annexed hereto as Exhibit B.

11. From that decision, plaintiffs appealed to the Commissioner, and the matter was heard de novo by the Associate Commissioner, on November 2, 1977, November 21, 1977, and December 21, 1977.

12. By motion made October 24, 1977, plaintiffs asked the Associate Commissioner to recuse himself since he was not an impartial hearing officer, as required by federal law. A copy of the Motion to Recuse is annexed hereto as Exhibit C. The Associate Commissioner denied plaintiffs' motion by letter dated October 28, 1977, a copy of which is annexed hereto as Exhibit D.

13. The requirement of the State Regulations that plaintiffs submit the controversy between themselves and the School Committee to the School Committee itself, violates plaintiffs' right to a hearing before an impartial tribunal as guaranteed by

the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and 20 U.S.C. § 1415 (formerly 20 U.S.C. §1413(a)(13).

14. The hearing conducted before the Associate Commissioner, likewise denied the plaintiffs procedural due process as guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; 20 U.S.C. §1415; and final regulations adopted by the United States Department of Health, Education and Welfare; specifically, 45 C.F.R. §§121a.506, 121a.507, 121a.510 and 121a.512.

15. On April 17, 1978, the Associate Commissioner made a decision on the merits. Plaintiffs received a copy of this decision on April 25, 1978. A copy is annexed hereto as Exhibit E. Said decision is a nullity since the hearing was conducted before the Associate Commissioner and he is a person disqualified by law from hearing such matters

as Tommy's appeal from his LEA. The decision states:

> "...it is the responsibility of MHRH (now DCF) to provide special education and related services for Thomas at Bradley Hospital and that the School Committee is required to contribute to MHRH (now DCF) the 'per pupil cost' as its share of the cost of the special educational and related services provided to Thomas."

The Associate Commissioner, in a final footnote to his decision, disposed of Plaintiffs' argument that they cannot be required to contribute to the cost of providing Tommy with an appropriate special education, as would be the case if MHRH (now DCF) were the agency which placed him in the special education program at Bradley Hospital. He noted:

> "The appellants (plaintiffs) have also asserted that they are not required to pay MHRH (now DCF) any amount for the services provided to Thomas. Their argument in this regard is based on various federal statutes and regulations and, ultimately on the Supremacy Clause of the United States Constitution. (Art. VI, Para. 2). This issue, however, is not within our jurisdiction on this appeal."

16. At all times mentioned herein, the State of Rhode Island through the SEA has submitted a State Plan, pursuant to 20 U.S.C. §1413, to the U.S. Office of Education and in return has received federal funds for state administered programs of special education and related services. Each said State Plan has incorporated the State Regulations and therefore, said Regulations become a binding part of the State Plan and are enforceable as part of the federal statutes and regulations relating to education of handicapped children.

WHEREFORE, plaintiffs seek relief as follows:

1. A declaratory judgment that the procedural safeguards contained in Article IX of the State Regulations do not comply with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; the provisions of 20 U.S.C. §1415 and CFR §§121a.506, 121a.507, 121a.510 and 121a.512.

2. A prohibitory injunction against the Commissioner and Associate Commissioner conducting any more hearings in review of decisions of the Rhode Island LEA's until and unless the defendant Board of Regents, adopts regulations which conform in all respects to the requirements of 20 U.S.C. §1415 and Chapter 121a. of Title 45 - Code Federal Regulations.

3. Reasonable attorneys' fees as provided in 42 U.S.C. §1988 and 31 U.S.C. §1244(e).

4. Their costs in this action.

5. Such additional and further relief as the Court deems just in the circumstances of this case.

COUNT II

16. The assertion of the School Committee and the Associate Commissioner of Education that MHRH (now DCF) is responsible for the cost of Tommy's placement in an appropriate educational program is a transparent

attempt, both by the LEA, and the SEA, to avoid responsibility for children such as Tommy for which the LEA cannot provide, within the local school system, an appropriate education. In addition, it violates Tommy's rights under federal and state law to have his LEA provide a free, appropriate educational placement without regard to whether or not said placement can be made within the local school system.

The School Committee has discriminated against Tommy because he has a particular handicapping condition, i.e., emotional disturbance, whereas it has not discriminated against other children with different handicaps. Such discrimination violates the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution and 29 U.S.C. §794.

17. The decisions of the LEA and the SEA are based solely on fiscal considerations and are not mindful of federal law or Tommy's

urgent need for an appropriate educational placement which provides "special education" and "related services".

18. Unless this Court had previously interceded on Tommy's behalf, and ordered the School Committee to continue funding Tommy's placement, pending exhaustion of state administrative remedies, he would be on the outside looking in while losing the precious benefits he received at Bradley Hospital.

19. The program at Bradley Hospital provided Tommy with only a "special education" and "related services".

20. Because of the special education and related services Tommy received at Bradley Hospital he has progressed to a less restrictive educational environment, namely Harmony Hill School in Chepachet, Rhode Island. The program at Harmony Hill School also provides Tommy with a special education and related services.

21. Despite being handicapped by, among other things, a serious emotional disturbance, Tommy is entitled to a free, appropriate education at the expense of his LEA.

22. The decision of the Associate Commissioner, in addition to being fatally defective because it violates Tommy's procedural due process rights, is erroneous because it is based on a misinterpretation of Rhode Island and federal law.

WHEREFORE, plaintiffs seek relief as follows:

1. Review and reversal of the final decision of the SEA (Exhibit E).

2. A declaratory judgment that the School Committee and not DCF is responsible to provide Tommy a free education appropriate to his special needs as a handicapped child.

3. A mandatory injunction against the School Committee, requiring it to provide a free education to Tommy, appropriate to his special needs as a handicapped child.

4. Reasonable attorney's fees as provided in 42 U.S.C. §1988 and 31 U.S.C. §1244(e).

5. Their costs in this action.

6. Such additional and further relief as the Court deems just in the circumstances of this case.

THOMAS F. SMITH, JR.
URSULA J. SMITH,
Parents, Guardians and Next
Friends of Thomas F. Smith, III,
THOMAS F. SMITH, III.
By their attorneys,
OSTER, GROFF & PRESCOTT
936 Smithfield Avenue
Lincoln, Rhode Island 02865

/s/
GEORGE M. PRESCOTT

Dated September 16, 1980

[Certificate of Service omitted in printing]

[Exhibits A-E omitted in printing]

**ANSWER OF STATE DEFENDANTS WILLIAM ROBINSON, THOMAS SCHMIDT, AND THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION (SEPT.30, 1980)**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

[Title omitted in printing]

ANSWER OF WILLIAM P. ROBINSON JR., ASSOCIATE RHODE ISLAND COMMISSIONER OF EDUCATION, THOMAS SCHMIDT, RHODE ISLAND COMMISSIONER OF EDUCATION, AND THE RHODE ISLAND BOARD OF REGENTS FOR EDUCATION

FIRST DEFENSE

The complaint fails to state claim upon which relief can be granted.

SECOND DEFENSE

Defendants possess immunity and good faith immunity.

THIRD DEFENSE

Plaintiffs have failed to exhaust their administrative remedies.

FOURTH DEFENSE

Defendants admit the allegations contained in paragraphs 1, 2, 4, 5, 6, 7, 8, 10, 11, and 12 of the complaint. Defendants admit paragraph 3 of the complaint except that they deny that Commissioner Robinson has other duties. Defendants deny the allegations contained in paragraphs 13, 14, 15, 16 (II), and 17 of the complaint, defendants aver that they are without sufficient information to form a belief as to the validity of the allegations contained in paragraphs 9, 19, and 20 of the complaint. Paragraphs 16 (I), 18, 21, and 22 of the complaint are conclusions of law to which no answer need be made but to the extent these paragraphs are deemed to include allegations of fact they are denied.

WHEREFORE, defendants demand judgement in their favor and their costs.

State Party Defendants

By Their Attorney

/s/
Forrest L. Avila
Legal Counsel to the
Commissioner of Education

[Certificate of Service omitted in printing]

**ORDER: FINDINGS OF FACT, DECLARATION OF PLAINTIFFS' RIGHTS, ENTRY OF PERMANENT INJUNCTION, APPROVAL OF PARTIAL AWARD OF ATTORNEYS FEES, AND RECOGNITION OF PLAINTIFFS' CLAIMS AGAINST THE STATE DEFENDANTS FOR ATTORNEYS FEES (JAN. 12, 1981)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR, et als | : | |
| | : | |
| -vs- | : | C.A. No. |
| | : | 76-0510 |
| CUMBERLAND SCHOOL COMMITTEE, et als | : | |

ORDER

The Court having had the benefit of conferences with counsel for all parties in interest, and the answers of the Rhode Island Supreme Court to the two (2) questions certified in this matter to said court, by agreement between counsel for the plaintiffs and the defendant, Cumberland School Committee, the Court makes the following:

FINDINGS OF FACT

1. The minor plaintiff, Thomas F. Smith, III, (hereinafter sometimes

"Tommy") is a multihandicapped child within the meaning of federal and Rhode Island law.

2. Tommy is in need of "special education" and "related services" as defined in both federal and Rhode Island law.

3. Tommy resides with his parents in Cumberland, Rhode Island and currently attends Harmony Hill School in Glocester, Rhode Island. All of the services provided Tommy at Harmony Hill School are included within the definitions of "special education" and "related services" referred to in paragraph 2. above.

4. The defendant, Cumberland School Committee is a "local educational agency" as defined by federal law and receives federal funds for education of handicapped children.

5. Harmony Hill School is a facility whose program is licensed as a special education program by the Rhode Island Commissioner of Education.

Upon consideration of the foregoing findings of fact and applicable federal statutes and regulations the Court makes the following declaration of plaintiffs' rights;

1. Thomas F. Smith, III is entitled to a free, appropriate special education and related services.
2. The Cumberland School Committee is responsible for providing Tommy with a free, appropriate special education and related services.
3. Tommy is entitled to have the full cost of his attendance at Harmony Hill School paid by the Cumberland School Committee.
4. Tommy is entitled to the benefit of all the procedural safeguards con-

tained in 20 U.S.C. § 1415 and 45 C.F.R. §§ 121a.500 et seq in any contest over his participation in, the continued appropriateness of, or any proposed change in, his placement in the special education program at Harmony Hill School and any and all other special education programs in which he may be enrolled in the future.

The Court hereby permanently enjoins the defendant, Cumberland School Committee, its officers, agents, servants and employees and all persons in active concert with them to fully and faithfully provide Thomas F. Smith, III and his parents with the substantive and procedual [sic] rights to which they are entitled as set forth above.

To the extent the plaintiffs' substantive and procedual [sic] rights as set forth in the above declaration of rights are inconsistent with or contrary to the decision

of the Rhode Island Commissioner of Education in this matter, dated April 17, 1978, the same is hereby reversed and vacated.

Plaintiffs' counsel, George M. Prescott, Esquire, is hereby awarded a counsel fee pursuant to 42 U.S.C. § 1988 and 31 U.S.C. § 1244(e) in the amount of $8,000.00.

This order is entered by agreement between the plaintiffs and the defendant, Cumberland School Committee and is without prejudice to the plaintiffs' claims against the other defendants, including their claims for additional counsel fees.

Enter: /s/ Raymond J. Pettine
Chief Judge 1/12/81

Assented to as to form and substance
/s/ George M. Prescott
Counsel for the Plaintiffs

/s/ James M. Shannahan
Counsel for the defendant,
Cumberland School Committee

**MEMORANDUM AND ORDER: DENIAL OF THE STATE DEFENDANTS' MOTION TO DISMISS FOR LACK OF A CAUSE OF ACTION AND ON GROUNDS OF IMMUNITY (JUNE 4, 1981)**

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR. et al. | ) | |
| | ) | |
| v. | ) | Civil Action |
| | ) | No. 76-0510 |
| CUMBERLAND SCHOOL COMMITTEE, et al. | ) | |
| | ) | |

MEMORANDUM AND ORDER

The facts of this seemingly interminable case have been set out in prior opinions of this Court, see Opinion issued December 22, 1978, and the Supreme Court of Rhode Island, see -- R.I. -- , 415 A.2d 168 (1980). They need not be repeated here. The State defendants -- the Associate Commissioner of Education, the Commissioner of Education, the Board of Regents, and the Director of the Department of Mental Health, Retardation, and

Hospitals -- have moved to dismiss on divers grounds. For the reasons given below, this motion is denied.

1. The Source of Plaintiffs' Cause of Action

The Supreme Court has once again declined to decide whether §504 of the Rehabilitation Act supports a private right of action. See University of Texas v. Camenisch, 49 U.S.L.W. 4468 (April 29, 1981). The State reiterates its position that no such cause of action exists. The Court believes it unnecessary to decide this question after Maine v. Thiboutot, 48 U.S.L.W. 4859 (June 25, 1980). In that case, the Supreme Court held that § 1983 encompasses deprivations of rights afforded by even those federal statutes not directly concerned with civil liberties. Although the interplay between this holding and the whole private-right-of-action analysis remains to be explored, it seems fairly certain that

handicapped children have some enforceable "rights" under the Rehabilitation Act--that is, that the statute was enacted for their especial benefit--in the same way that the welfare recipients in Thiboutot have "rights" under the Social Security Act.

In any event, and perhaps more to the point, this Court has already held, in an opinion issued January 17, 1977, that §1983 affords the plaintiffs a cause of action here. Manifestly, this is now the law of the case.

2. Possible Judicial or Legislative Immunities of the Defendant State Officials

The State argues that, because defendants Associate Commissioner of Education and Commissioner of Education were acting in a judicial capcity when they sustained the Cumberland School Committee's decision not to fund Tommy's special schooling, they are entitled to judicial immunity. It argues in addition that all the state defendants are

shielded by legislative immunity to the extent that plaintiffs' complaint concerns legislative acts such as the promulgation of regulations.

The State's argument is inapposite to this case. The defendant officials are not being sued in their individual capacities for damages. Cf. Lake Country Estates, Inc. v. Tahoe Planning Agency, 440 U.S. 391 (1979); Pierson v. Ray, 386 U.S. 547 (1967) (in both, officials sued for damages). Rather, plaintiffs are seeking declaratory and injunctive relief from certain official policies and practices they claim violate federal constitutional and statutory mandates. The officials are named defendants only so that plaintiffs might take advantage of the procedure approved in Ex parte Young, 209 U.S. 123 (1908), for raising federal law challenges to state statutes and regulations. Plaintiffs have properly alleged that these officials are responsible for the formulation and

implementation of educational policies and procedures in the State. Thus, these officials have sufficient connection with the challenged decisions and practices to serve as stand-ins for the State itself. Shell Oil Co. v. Noel, 608 F.2d 208, 211-12 (1st Cir. 1979). In such a case, where there is no attempt to hold the defendants personally liable in damages for acts taken as part of their official duties, the shield of immunity is neither available nor necessary.[1/] See Pence v. Rosenquist, 573 F.2d 395, 398 (7th Cir. 1978); Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1366 (9th Cir. 1977), rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Planning Agency, 440 U.S. 391 (1979); Maria Santiago v. Corporacion de Renovacion Urbana y Vivienda, 544 F.2d 1210, 1212-13 (1st Cir. 1977); Littleton v. Berbling, 468 F.2d 389, 406-08 (7th Cir. 1972) & cases therein cited, rev'd on other grounds sub nom. O'Shea v. Littleton, 414 U.S. 488 (1974).

3. Power of the State Defendants to Affect the Decision of the Cumberland School Committee

The State's most vigorous argument in favor of dismissal asserts in substance that the defendant officials had no power to force the Cumberland School Committee to abandon the legal position it had taken with respect to funding Tommy's schooling; therefore, it argues, they cannot be held responsible in a subsequent court action challenging the legality of the position. With respect, the Court simply does not understand how the State can seriously propound this argument.

Certainly it is true, as the State points out, that the Cumberland School Committee is empowered by statute to exercise "the entire care, control, and management" of the local public schools. See R.I.G.L. §16-2-18. This legislative mandate establishes the school committee as "the most important forum in the administrative hierarchy" of public education in the state. McSally v.

Board of Regents, ___ R.I. ___, 401 A.2d 438, 440 (1979). What the State inexplicably fails to note, however, is that the School Committee's power, though plenary, is not absolute:

> Any person aggrieved by any decision or doings of any school committee or in any other matter arising under any law relating to schools or education may appeal to the commissioner of education who, after notice to the parties interested of the time and place of hearing, shall examine and decide the same without cost to the parties involved.

R.I.G.L. §16-39-2. See R.I.G.L. 16-1-5(j). In such cases, the Commissioner has broad powers to dispose of the matter. McSally v. Board of Regents, ___ R.I. at __, 401 A.2d at 440; School Commission v. State Board of Education, 103 R.I. 359, 364, 237 A.2d 713, 716 (1968). He may consider the case de novo, taking evidence and substituting his judgment for that of the school committee. See School Committee v. State Board of Education, 103 R.I. at 363-64,

237 A.2d at 716-17. The resulting decision is not merely an advisory opinion. The Commissioner may direct the School Committee to take certain actions and, if necessary, obtain a writ of mandamus to compel compliance. See Randall v. Wetherell, 2 R.I. 120, 122 (1852). Ultimately, the Board of Regents reviews his decision. See R.I.G.L. §§16-39-3; 16-49-1; 16-49-4(9).

Thus the Court is at a loss to understand the State's argument that the Department of Education through its head, the Commissioner, lacks "the executive authority to compel a local school committee, by executive fiat, to abandon a legal position which a local school committee has adopted in an individual case." Memorandum at 1. Perhaps the mechanism for exerting control is not "executive fiat", but this is hardly fatal to plaintiffs' case. Their complaint against the Commissioner and Associate Commissioner is not that these officials failed to fulfill

some overarching duty to correct, spontaneously and on their own motion, an erroneous action of a school committee. Rather, plaintiffs pursued the statutory review procedure and received from these very officials an unfavorable ruling. The Associate Commissioner held a hearing and, after making findings of fact and conclusions of law, sustained the school committee's position. See Decision of April 17, 1978, appended to plaintiffs' Second Amended Complaint. This decision was duly approved by the Commissioner. See id. at 15. According to the Rhode Island statutory and decisional law discussed above, the Commissioner, or his designee, could indeed, as a result of plaintiffs' appeal, have ordered "the local school system to drop a legal position which the school committee felt was justifiable." Defendant's Memorandum at 2. Instead, he sanctioned the Cumberland School Committee's interpretation of Rhode Island law, endorsing

it as the official policy that governed plaintiffs' case.

The Court can to some extent sympathize with the State's complaint that it (through the presence of its officials as defendants) is being held responsible for a legal position which it actively opposed when the decisive state law question was subsequently submitted on certification to the Rhode Island Supreme Court. However, even though the State ultimately sided with plaintiffs against the Cumberland School Committee, the fact remains that the Commissioner of Education--the highest official within the Department of Education--had rendered through his designee a binding decision that aggrieved them. The state defendants had the power and the opportunity to satisfy plaintiffs' grievance. That their refusal to do so was made in good faith and with colorable support in existing law is irrelevant to whether they are properly included in the complaint as

responsible for official acts and policies that allegedly violated plaintiffs' federal rights.[2/]

Accordingly, the motion to dismiss the defendant State officials is hereby denied.

So ordered.

* * *

Enter:

/s/ Raymond J. Pettine
Chief Judge

June 3, 1981

## FOOTNOTES

1/ Similarly, there appears little doubt that any award of attorney's fees that might be made against the State defendants in this case would be assessed against them in their official capacity, to be paid from official funds. See Hutto v. Finney, 437 U.S. 678, 699-700 (1978).

2/ Again, the Court emphasizes that there is no claim here that the Commissioner or Associate Commissioner is personally liable in damages. Thus, good faith immunity plays no part in this case.

**ORDER: DECLARATION OF PLAINTIFFS' RIGHTS AS TO THE ENTITLEMENT OF PLAINTIFF THOMAS F. SMITH III TO A FREE APPROPRIATE EDUCATION, AND DIRECTION WITH REGARD TO MOVING FOR AN AWARD OF ATTORNEYS FEES (JUNE 4, 1981)**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR., et als | ) | |
| | ) | |
| v. | ) | C.A. No. |
| | ) | 76-0510 |
| CUMBERLAND SCHOOL COMMITTEE, et als | ) | |
| | ) | |

O R D E R

The court having considered the record of the proceedings before the Associate Rhode Island Commissioner of Education which were held on November 2, 21 and December 21, 1977; the parties having submitted the case for decision upon said record alone, waiving their rights under 20 USC §1415(a)(2) to present further evidence; and having the benefit of answers to two (2) questions of

law certified to the Rhode Island Supreme Court, the court makes the following:

FINDINGS OF FACTS

1. The minor plaintiff, Thomas F. Smith, III, (hereinafter sometimes "Tommy") is a multihandicapped child within the meaning of federal and Rhode Island law.

2. Tommy is in need of "special education" and "related services" as defined in both federal and Rhode Island law.

3. Tommy resides with his parents in Cumberland, Rhode Island and currently attends Harmony Hill School in Glocester, Rhode Island. All of the services provided Tommy at Harmony Hill School are included within the definitions of "special education" and "related services" referred to in paragraph 2 above.

4. At all times relevant to this action, Tommy has attended special education programs under the jurisdiction of the defendant, Rhode Island Board of Regents for Education, the same being licensed by the defendant, Rhode Island Commissioner of Education.

Upon consideration of the foregoing findings of fact, and in light of applicable federal and state statutes and regulations, the Court makes the following declaration of plaintiffs' rights:

1. Thomas F. Smith, III is entitled to a free, appropriate special education and related services.

2. In accordance with the Rhode Island Supreme Court's opinion in Smith v. Cumberland School Committee, -- R.I. --, 415 A.2d 168 (1980), Tommy is entitled to have the full cost of said special education and

related services paid by the Cumberland School Committee so long as he is of qualifying age and resides in the Cumberland School District.

3. The decision of the Cumberland School Committee rendered on February 10, 1977 is contrary to the preceding delcaration number "2"; it therefore cannot be deemed an accurate and controlling statement of the rights and obligations of the parties with respect to Tommy's education.

4. The decision of the Associate Commissioner of Education rendered on April 17, 1978 and approved by the Commissioner of Education, which affirmed the decision of the Cumberland School Committee, is also contrary to the preceding declaration numbered "2"; it therefore

cannot be deemed an accurate and controlling statement of the rights and obligations of the parties with respect to Tommy's education.

It having been established that Thomas Smith III was, and is, entitled to be educated at the cost of the Cumberland School Committee as a matter of state law, plaintiffs have obtained the object of their suit and it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims.

The entry of this order resolves all issues in this case with the exception of the question of attorney's fees. Plaintiffs are hereby given fourteen days to move for an award of fees if they intend to do so.

* * *

Enter:

/s/ Raymond J. Pettine
Chief Judge

June 3, 1981

**PLAINTIFFS' MOTION FOR AN AWARD OF FEES AND OTHER COSTS (JUNE 23, 1981)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| THOMAS F. SMITH, JR. et als | : | |
| | : | |
| -vs- | : | C.A. No. |
| | ) | 76-0510 |
| CUMBERLAND SCHOOL COMMITTEE, | : | |
| et als | : | |

PLAINTIFFS' MOTION FOR AN AWARD OF FEES AND OTHER COSTS

Now come the plaintiffs, in the above entitled cause and move the court to award their counsel a fee, and for payment of their other costs, in the total amount of $31,790.73 against the defendants; Associate R.I. Commissioner of Education, William P. Robinson, Jr.; R.I. Commissioner of Education, Thomas P. Schmidt, and his successor in office; and the Rhode Island Board of Regents for Education.

Thomas F. Smith, Jr., et als
By their attorneys,
OSTER, GROFF & PRESCOTT
936 Smithfield Avenue

Lincoln, Rhode Island 02865

June 23, 1981

/s/
GEORGE M. PRESCOTT

[Certificate of Service omitted in printing]

**OPINION: ORAL DECISION FROM THE BENCH AWARDING ATTORNEYS FEES (APR. 30, 1982)**

[The district court's Oral Decision is set forth in the Appendix to the Petition for Certiorari at A. 31 through A. 58.]

**ORDER: AMENDMENT OF THE FEE AWARD, AND DIRECTION FOR PREPARATION OF A FINAL ORDER (JUNE 5, 1982)**

[This Order and its attachments are set forth in the Appendix to the Petition for Certiorari at A. 24 through A. 30.]

**ORDER: FINAL ORDER DIRECTING THE STATE DEFENDANTS TO PAY FEES AND COSTS TO PLAINTIFFS' LAWYER (JUNE 11, 1982)**

[The district court's Final Order is set forth in the Appendix to the Petition for Certiorari at A. 22 to A. 23.]

**OPINION AND JUDGMENT OF THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT: REVERSAL OF THE DISTRICT COURT'S AWARD OF ATTORNEYS FEES (MAR. 24, 1983)**

[The court of appeals' Opinion and Judgment are set forth in the Appendix to the Petition for Certiorari at A. 1 through A. 21.]

**ORDER OF THE U.S. SUPREME COURT GRANTING THE WRIT OF CERTIORARI (OCT. 31, 1983)**

SUPREME COURT OF THE UNITED STATES

No. 82-2120

Thomas F. Smith, Jr., et al.,

Petitioners,

v.

William P. Robinson, Jr., Rhode Island Associate Commissioner of Education, et al.

ORDER ALLOWING CERTIORARI. Filed October 31, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted.

Office Supreme Court, U.S.
FILED
SEP 29 1983
ALEXANDER L. STEVAS,

No. 82-2120.

# In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THOMAS F. SMITH, JR., ET AL.,
PETITIONERS,

*v.*

WILLIAM P. ROBINSON, JR., ET AL.,
RESPONDENTS.

**Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

FORREST L. AVILA,
*Legal Counsel to the Rhode Island Commissioner of Education,*
Rhode Island Department of Education,
22 Hayes Street,
Providence, Rhode Island 02908.
(401) 277-2031

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

## Question Presented.

Attorney's fees are not awardable in actions brought essentially under the Education for All Handicapped Children Act (20 U.S.C. §§ 1401 *et seq.*) simply because a plaintiff also purports to allege a due process and equal protection claim or claims under the Rehabilitation Act of 1973.

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No. 82-2120.

# In the

# Supreme Court of the United States.

OCTOBER TERM, 1983.

THOMAS F. SMITH, JR., ET AL.,
PETITIONERS,

*v.*

WILLIAM P. ROBINSON, JR., ET AL.,
RESPONDENTS.

**Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

## Travel and Facts of the Case.

The travel and facts of the case are adequately stated in petitioners' brief.

## Reasons for Denying the Writ.

### I. Attorney's Fees are Not Awardable in This Case.

In this case petitioners have conceded that the Education for All Handicapped Children Act, 20 U.S.C. §§ 1401 *et seq.* (the "EAHCA") by its own terms does not provide for attorney's fees. They also concede that they have never argued, and that they are not now arguing, that the EAHCA is itself covered by the "and the laws" provision of 42 U.S.C. § 1983 (Petitioners' Brief, n. 3). Petitioners' sole contention is that in their complaint they included a count alleging a violation of their right to due process and equal protection. They concede that the courts below never addressed these supposed constitutional issues. In *Paul Rollinson* v. *Carrol W. Biggs*, C.A. No. 80-165, a case similar to the case at bar, where constitutional claims were alleged in an EAHCA action, but never addressed, the District Court for the District of Delaware wrote on the question of attorney fees as follows:

> The constitutional grounds asserted by the plaintiffs pose more significant problems. Initially it must be recognized that a court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1941) (Brandis, J., concurring). Consequently, the plaintiffs must only show that they have presented a "substantial" constitutional claim. They need not demonstrate that they prevailed on the substance of the claim. *Maher* v. *Gagne*, 448 U.S. 122, 132 (1980); cf. *Hagans* v. *Lavine*, 415 U.S. 528, 537-38 (1974) (a "substantial" claim for purposes of federal jurisdiction is one which is not ines-

capably frivolous under previous decisions). From this twilight zone of uncertainty, the Court is thrust into a virtual fantasy world because the litigation settled before any disposition of the merits. The Court, therefore, finds itself in the absurd position of considering the constitutional claims in the surreal milieu of a motion for attorney's fees for claims that were neither fully developed nor considered by this Court in a decision on the merits.

Plaintiffs raise two distinct constitutional claims: first, that defendants have violated the equal protection clause of the Fourteenth Amendment by denying Kyle a free appropriate education; and second, that the defendants have violated the due process clause of the Fourteenth Amendment by failing to utilize an impartial review officer. Under the *Hagans* test, at least the equal protection claim would support a finding of "substantiality" sufficient to support federal question jurisdiction. In such a situation the Supreme Court, in quoting the legislative history of section 1988 stated:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'

*Maher* v. *Gagne*, 448 U.S. at 132-33 n.15 (quoting H.R. Rep. No. 94-1558, p.4, n.7 (1976) citations omitted).

A strong argument may be made that *Maher* dictates only two results: first, that the district court consider the

merits of the constitutional claim to determine if the plaintiff would have prevailed and thereby be entitled to attorney's fees; or second, in the exercise of discretion, the district court may decline to consider the constitutional claim but must award fees. This interpretation, however, appears directly contradictory to the statutorily required finding that the party prevailed on a claim in order to justify the award of fees under section 1988. The "substantiality" test fails to provide an adequate basis for analysis because it is not difficult to construct a scenario where a constitutional claim may be substantial enough to support jurisdiction yet may not support judgment in favor of the plaintiff. In fact, the equal protection claim in this case may well represent such a situation. Nonetheless, in this context, disposition of a motion for attorney's fees in a case where there has been neither development nor adjudication of the constitutional claims, I feel it inappropriate and therefore decline to undertake such an analysis of the merits of the constitutional claim.

In the current context, therefore, attorney's fees are not available for a constitutional claim brought pursuant to section 1983 when the plaintiffs seek no more than the EAHCA grants.

As the First Circuit Court of Appeals stated in the case at bar, *Smith* v. *Cumberland School Committee*, 703 F.2d 4, 8-9 (1st Cir. 1983):

> The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to Thomas because of his handicap, are factually identical to the EAHCA claims. Indeed, in enacting the EAHCA Congress sought to ensure that handicapped

children receive the very "rights" that plaintiffs claimed were constitutional under section 1983. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 6-7, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1430-31 (legislation said to be designed to enable states to fulfill their constitutional obligations to handicapped children). Thus, the only difference between the statutory and constitutional claims is that the former carries with it a far more favorable legal standard for the plaintiffs and enabled them to prevail on what would otherwise have been fairly questionable claims. Because Congress, in providing statutory remedies for the same factual complaints, did not authorize attorneys' fees for such actions, we do not believe that section 1988 is a sufficient basis for the granting of attorneys' fees here. Plaintiffs' mere recitation of a section 1983 claim cannot create a right to attorneys' fees in litigation as to which Congress, perhaps recognizing the shortness of school funds, has not seen fit to make a special award. *Cf. Scruggs* v. *Campbell*, 630 F.2d 237 (4th Cir. 1980) (plaintiffs cannot evade EAHCA's exhaustion requirements merely be reciting section 1983 in their complaint). If this were not so, attorneys' fees would become available in almost every case by the mere incantation of section 1983. *See Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Statutory Grounds*, 130 U.Pa.L.Rev. 488, 518 (1981).

In sum the incantation of the words "due process and equal protection" followed by an invocation of "42 U.S.C. § 1983 and 42 U.S.C. § 1988" should not be allowed to transmogrify a non-fee case into a fee case. If Congress had wished the statutes of the United States to provide fees in such cases it would have done so.

Furthermore, assuming, *arguendo*, that plaintiffs had constitutional claims, the specific vehicle which Congress provided to vindicate these claims, the EAHCA, does not provide for fees. By the standard principles of statutory construction a specific statute such as the EAHCA should control over the more general terms of 42 U.S.C. §§ 1983 and 1988, *e.g.*, *Green* v. *Burns*, 433 F. Supp. 219 (D. R.I. 1977). The fact that the EAHCA was enacted under the spending clause, rather than as a 14th Amendment enforcement measure (*Board of Education* v. *Rowley*, ____ U.S. ____, 102 S.Ct. 3034 (1982)) does not change this fact.

## II. The Rehabilitation Act is Not Applicable to This Case.

The Rehabilitation Act of 1973 and its provision for attorney's fees is not applicable to this case. As the First Circuit said in the case at bar (*Smith* v. *Cumberland*, *supra*):

> We reach this conclusion for substantially the same reasons that we reject an attorneys' fees award under section 1988. Section 504 of the Rehabilitation Act is a general prohibition of discrimination against otherwise qualified handicapped individuals in federally funded programs. It does not specifically apply to the education of handicapped children. The EAHCA, in contrast, is a comprehensive act specifically providing substantive and procedural rights for handicapped children denied an appropriate public education. While the more specific rights created by the EAHCA may not indicate a congressional intent to preclude "overlapping" actions under section 504, the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the

> fees provision of the more general Rehabilitation Act. *See* page 8, *supra*. This result is particularly appropriate where the very existence of a private right of action under section 504 is the subject of doubt. *But see Department of Education* v. *Katherine D.*, 531 F. Supp. 517 [D. Hawaii 1982]; *Mattie T.* v. *Holladay*, 522 F. Supp. 72 (N.D. Miss. 1981); *Campbell* v. *Talladega County Board of Education*, 518 F. Supp. 47 (N.D. Ala. 1981); *Tatro* v. *Texas*, 516 F. Supp. 968 [N.D. Tex. 1981].

703 F.2d at 9-10.

Once again we are back to the original premise. If Congress had intended fees to be awardable under the EAHCA, it would have provided for them. It has not done so and so such fees are not awardable by a verbal invocation of the Rehabilitation Act.

## Conclusion.

The decision of the Court of Appeals in the above-entitled matter should be affirmed and the petition for certiorari should be dismissed.

Respectfully submitted,

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No. 82-2120

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS F. SMITH, JR., et al.,

*Petitioners,*

—v.—

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,

*Respondents.*

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

1. Can plaintiffs, who allege substantial constitutional claims which are not addressed in view of plaintiffs' total success on a non-fee statutory claim, be denied an award of attorneys fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, contrary to this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980), and contrary to the express intent of Congress?

2. Can plaintiffs, who allege a substantial claim under § 504 of the Rehabilitation Act in addition to substantial constitutional claims, none of which is addressed in view of plaintiffs' total success on a non-fee statutory claim, be barred from receiving an award of attorneys fees under § 505(b) of the Rehabilitation Act as amended in 1978, 29 U.S.C. § 794a(b), contrary to this Court's reasoning in Maher v. Gagne, and contrary to the express intent of Congress?

## LIST OF THE PARTIES

Petitioners, plaintiffs-appellees below, are THOMAS F. SMITH, JR., and URSULA J. SMITH, parents, guardians, and next friends of Thomas F. Smith, III, and THOMAS ["TOMMY"] F. SMITH, III.

Respondents, defendants-appellants below, are WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, and ARTHUR PONTARELLI, Rhode Island Commissioner of Education.

The local education agency defendant below, the Cumberland School Committee, is no longer a party to this proceeding.

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## OPINIONS BELOW

The decision of the U.S. Court of Appeals for the First Circuit, reversing the trial court and denying attorneys fees to petitioners, is reported as Smith v. Cumberland School Committee, 703 F.2d 4 (1st Cir. 1983). A copy of the decision, entered on March 24, 1983, is attached as Appendix A to the Certiorari Petition, A. 1-21.

The decision of the U.S. District Court for the District of Rhode Island, awarding attorneys fees to petitioners, is unreported. The decision is set forth in a final order entered on June 11, 1982, in an earlier order of June 5, 1982 with two attachments, and in the transcript of the trial court's oral opinion from the bench on April 30, 1982, all of which are attached as Appendix B to the Certiorari Petition, A. 22-58.

## JURISDICTION OF THIS COURT

The judgment of the U.S. Court of Appeals for the First Circuit was entered on March 24, 1983. A petition for a writ of certiorari was filed on June 22, 1983, and certiorari was granted on October 31, 1983. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

## STATUTES INVOVLED

This case involves the construction and application of two fee-shifting statutes, enacted by Congress in 1976 and 1978, respectively.

1. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended, provides in pertinent part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42]. . . the court, in its discretion, may allow the prevailing party, other than the

> United States, a reasonable attorney's fee as part of the costs.

2. Section 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b), which was added to the Rehabilitation Act through amendments enacted in 1978, provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case also involves the Education for All Handicapped Children Act of 1975. Section 615(e)(2) of that Act, 20 U.S.C. § 1415(e)(2), which authorizes judicial review but which does not expressly authorize attorneys fees, provides in relevant part:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

## STATEMENT OF THE CASE

Petitioners -- plaintiffs below -- challenged the exclusion of petitioner Thomas ["Tommy"] F. Smith III from receiving a free public education solely because of his handicap. Petitioners, in addition to asserting state law violations, alleged due process and equal protection claims under § 1983, a claim under the Rehabilitation Act of 1973 as amended in 1978, and a claim under the Education for all Handicapped Children Act of 1975 [the "EAHCA"]. Petitioners won the relief sought in this litigation -- a free public education for Tommy -- initially through a series of preliminary injunctions based on petitioners' due process claim, and ultimately through a permanent injunction and a declaratory judgment based upon an interpretation of state law (a ruling which avoided unnecessary adjudication of petitioners' federal claims).

Because petitioners were prevailing parties, and in view of the relief won by petitioners through their due process claim and based upon the substantiality of their equal protection claim, the district court awarded fees to petitioners under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 [the "1976 Fees Act" or "§ 1988"].

The First Circuit, while not disputing the fact that petitioners were prevailing parties and not disputing the substantiality of petitioners' constitutional claims, reversed the fee award under the 1976 Fees Act on the ground that a fee award was precluded by petitioners' claim under the EAHCA, a federal statute which does not itself authorize fees. Based on the same reasoning, the First Circuit also held that petitioners, who had asserted a substantial claim under § 504 of the Rehabilitation Act, were not entitled

to fees under § 505(b), 29 U.S.C. § 794a(b), the fee provision added to the Rehabilitation Act in 1978.

The issues raised here directly concern only petitioners' entitlement to fees. Resolution of these issues flows from petitioners' claims and success on the merits.

## A. Proceedings on the Merits

Petitioner Tommy Smith, a physically and emotionally handicapped child who walks with the aid of leg braces and crutches due to cerebral palsy, was eight years old when this litigation began. J.A. 9-10, 33.[1] Because he was both orthopedically impaired and emotionally disturbed, Tommy was then enrolled in a special education program at Bradley

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1. Citations to documents in the Joint Appendix are referred to herein as "J.A. ___"; citations to documents in the Certiorari Petition Appendix are referred to as "A. _____"; and citations to other documents in the Record are referred to by descriptions of the documents cited.

Hospital, a day program approved by respondent Commissioner of Education and paid for in part by the Cumberland School Committee. J.A. 9-10, 33, 54-55, 68, 80, 130. There was never any dispute in this litigation that the special education program, designed to provide "special education" and "related services" to children with Tommy's handicapping conditions, in fact provided Tommy with an "appropriate" education. J.A. 9-10, 25-26, 33-34, 62, 86, 130.

This litigation was initiated shortly after the Cumberland School Committee, on November 5, 1976, formally advised petitioners that it would no longer pay the costs of Tommy's state-approved special education program. J.A. 10-12, 25-26, 27-28, 30-31, 34. The dispute in this case ultimately focused not only on who was responsible for paying the costs but also on whether Tommy in fact would continue to receive an educa-

tion. In petitioners' view, since Tommy was a handicapped child residing in Cumberland, Rhode Island, the local School Committee was legally responsible for paying the costs of Tommy's state-approved special education program. J.A. 9-10, 51-52, 86, 155. The contrary position initially advanced by the School Committee, and thereafter pursued by the officials of the Rhode Island Department of Education, respondents here, was that Tommy, in addition to being orthopedically impaired, was an emotionally disturbed child as defined by state law and that his education and care were the responsibility of the state Department of Mental Health, Retardation and Hospitals ["MHRH"]. J.A. 25-26, 34, 71, 86, 99-102, 105, 109, 164-66.

The result of respondents' position, had it been effectuated, would have required Tommy's eventual placement in an MHRH program for which petitioners would have been obli-

gated to pay part of the costs. J.A. 101, 162, 138-44. Moreover, given the lengthy waiting list of emotionally disturbed children waiting to enter the underfunded MHRH program, respondents' position, if successful, would have required the immediate exclusion of Tommy from the special education program at Bradley Hospital followed by the provision of no state education through the MHRH program during the lengthy waiting period. J.A. 70, 85,138-44.

On November 26, 1976, petitioners sued the members of the Cumberland School Committee in federal court for violating the fourteenth amendment and particularly for violating the Due Process Clause by proposing the immediate termination of Tommy's special education without first providing petitioners a hearing under the applicable state regulations. J.A. 8-26. Based on the strength of their due process allegations, petitioners

won, on December 9, 1976, a TRO restraining the School Committee defendants from failing to maintain Tommy in the education program at Bradley. J.A. 27-29. On December 22, 1976, that restraining order was continued as a preliminary injunction. J.A. 30-31. That injunction in turn was continued, on January 17, 1977, to remain effective essentially until petitioners received their requested hearing and exhausted state hearing and appeal procedures. J.A. 32-48.

The School Committee defendants, after a hearing, rendered a decision reaffirming the earlier decision not to pay the costs of Tommy's education. J.A. 66-72. Following petitioners' state administrative appeal, respondents Commissioner and Associate Commissioner of Education similarly ruled on April 17, 1978 that Tommy's education was not the responsibility of the Rhode Island public

school system. J.A. 77-102.[2]

Immediately thereafter, with the administrative appeals concluded, petitioners were granted leave by the district court to file a First Amended Complaint, which added as defendants the respondents here, and which added to petitioners' constitutional claims a claim under the recently effective[3] Education for All Handicapped Children Act of 1975 ["EAHCA"]. J.A. 49-102.

Rather than proceeding -- perhaps unnecessarily -- to final judgment on petitioners' federal constitutional and statutory

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2. Respondents' ruling, reflecting the state's official position, was based solely on an interpretation of state law. J.A. 86-102. Respondents specifically declined to consider petitioners' arguments "based on various federal statutes and regulations and, ultimately, on the Supremacy Clause of the United States Constitution" on the ground that these matters were "not within our jurisdiction." J.A. 101 n.12.

3. The major substantive provisions of the EAHCA of 1975, Pub. L. No. 94-142, 89 Stat. 773, became effective on October 1, 1977. See Pub. L. No. 94-142, § 8(c), 89 Stat. 796.

claims, the district court at this point decided to certify the underlying state law dispute (whether conflicting state statutes placed the responsibility for educating resident handicapped children such as Tommy on the public school system, as petitioners argued, or on MHRH, as respondents had found) to the Rhode Island Supreme Court. J.A. 108-26. In reaching this decision, the district court pointed out that the result sought by petitioners in fact seemed to be required both by state law and by the recently effective federal EAHCA, J.A. 110-14, and that, in any event, if the state "statutes cannot be interpreted to conform with federal regulatory requirements, the Supemacy Clause of the Constitution dictates finding such non-conforming law violative of the federal statutory scheme," J.A. 119. Nonetheless, because "resolution" of the issue "will have far reaching effects throughout the state," J.A.

121, 124, because of the fact that petitioners "already enjoy preliminary injunctive relief" based on their due process claim, J.A. 121, and because the delay caused by certification accordingly would not "endanger any of [petitioners'] 'valuable federal rights,'" J.A. 121 (citation omitted), the district court certified the state law questions "in order to avoid unnecessary adjudication of constitutional and federal claims," J.A. 122, 124-25.

The Supreme Court of Rhode Island, on June 3, 1980, rendered a decision in petitioners' favor on the two state law questions certified by the district court, J.A. 129-51; see 415 A.2d 168 (1980). It stated at the outset of its decision that the state statutes "must be viewed in the context of the Education for All Handicapped Children Act of 1975," J.A. 134; and it concluded that, as a matter of state law, the Rhode

Island statutes placed the responsibility for the education of resident handicapped children such as Tommy on the public school systems under the jurisdiction of respondents, and not on MHRH, J.A. 133-51.

In addition to this state court victory, petitioners in the interim had won another favorable ruling from the district court: in response to petitioners' motion to modify the continuing due process preliminary injunction so as to have Tommy placed in a "less restrictive school environment" in view of the "substantial progress" that Tommy had made in the day program at Bradley Hospital,[4/] the district court modified the preliminary injunction to require that Tommy now be provided special education in the less restrictive environment day program at Harmony Hill School, J.A. 127-28.

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4. See Motion to Modify Preliminary Injunction filed in the district court on June 13, 1979. See also J.A. 127-28, 173-74, 190-91.

Subsequent to the modified due process injunction, and subsequent to the state Supreme Court's decision rendered in their favor, petitioners were granted leave to file a Second Amended and Supplemental Complaint, in which petitioners made clear that one of their constitutional claims was based on the Equal Protection Clause of theFourteenth Amendment, and in which petitioners added a claim under § 504 of the Rehabilitation Act. J.A. 152-68.

The district court thereafter issued an order declaring petitioners' rights and entering a permanent injunction. J.A. 172-76. In that order, the district court held, based upon the "applicable federal statutes and regulations," that Tommy was "entitled to have the full cost of his attendance at Harmony Hill School paid by the Cumberland School Committee" and that Tommy was "entitled to the benefit of all the proce-

dural safeguards contained in [the EAHCA with regard to] his placement in the special education program at Harmony Hill School and any and all other special education programs in which he may be enrolled in the future." J.A. 174-75.

Respondents nonetheless continued to contest their liability, a contest which resulted in a memorandum and order denying respondents' motion to dismiss, J.A. 177-78, and in a final order on the merits, J.A. 189-94. In the former, the district court held that petitioners had stated a claim under § 504 of the Rehabilitation Act, J.A. 178-79; recognized that the court in any event had "already held, in an opinion issued January 17, 1977 [see J.A. 32-48], that § 1983 affords the [petitioners] a cause of action here," and that "this is now the law of the case," J.A. 179; held that respondents in this suit for injunctive relief were not

protected by any good faith immunity, J.A. 179-81; and reaffirmed respondents' executive authority over and responsibility for the activities of local educational agencies, J.A. 182-87. This denial of respondents' motion to dismiss was subsequently affirmed on appeal by the First Circuit.[5/]

In its final order on the merits, the district court, "in light of the applicable federal and state statutes and regulations," J.A. 191, reiterated its earlier findings and declarations, J.A. 190-93; recognized that at "all times relevant to this action, Tommy has attended special education programs under the jurisdiction of the . . . Rhode Island Board of Regents for Education, the same being licensed by the [respondent], Rhode Island Commissioner of Education," J.A. 191; held

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5. See the one-page, unreported decision by the First Circuit in Smith v. Cumberland School Committee, Nos. 81-1454 and 81-1499 (1st Cir. Jan. 11, 1982), filed in the district court on January 12, 1982.

that respondents' official position was void as contrary to the decision rendered by the Rhode Island Supreme Court, J.A. 192-93; and concluded that since petitioners "as a matter of state law" had "obtained the object of their suit . . . it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims," J.A. 193. Petitioners were allowed two weeks to "move for an award of fees" against respondents. J.A. 193.

B. **Proceedings as to Fees**

Subsequent to the district court's recognition that they had "obtained the object of their suit," J.A. 193, petitioners on June 23, 1981, moved for an award of attorneys fees against respondents,[6] J.A.

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6. Petitioners were never forced to file a motion for fees against the Cumberland School Committee defendants. Instead, petitioners and the School Committee defendants settled petitioners' fee claim representing the time expended in proceedings against [cont'd. on next pg]

195-96. Consideration of petitioners' motion was initially stayed at respondents' request in view of the appeal from the district court's denial of respondents' motion to dismiss. J.A. 6. After the First Circuit affirmed the denial of respondents' motion to dismiss and further observed that petitioners had "won, as a matter of state law, all that [they] originally sought," see supra p. 17 note 5, the district court held a hearing on petitioners' fee request and thereafter rendered an oral decision from the bench awarding fees to petitioners, A. 31-58.

As the district court pointed out in its oral decision, respondents objected to any fee award[7] on the ground that petitioners

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the School Committee defendants for $8,000. J.A. 176. This time expended was eliminated from the petitioners' fee claim against respondents. A. 35-36, 39, 53-55.

7. Respondents also objected -- in the district court, A. 36-39, and on appeal, A. 7 -- to certain criteria used in calculating the amount of the fee award. Since the First Circuit never addressed the [cont'd. on next pg]

had alleged a claim under the EAHCA, a federal statute which does not itself expressly authorize fees. A. 37, 39. In rejecting this argument and in awarding fees under the 1976 Fees Act, the district court pointed out that the "complaint in this action was brought under the Constitution and laws of the United States, more specifically the due process and equal protection clauses of the 14th Amendment." A. 34-35. Both the due process claim and the equal protection claim were recognized by the district court as substantial constitutional claims.

The substantiality of the due process claim had been established earlier through the preliminary injunctive relief entered on that claim on December 22, 1976, J.A. 30-31, and on January 17, 1977, J.A. 32-48; through the court's ruling that the due process claim

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amount of the fee award but only entitlement to fees, A. 7, the only issues before this Court concern petitioners' entitlement to fees.

gave rise to a "cause of action . . . created by 42 U.S.C. § 1983," J.A. 33, 179; through the court's modification of the preliminary injunction well after respondents had been added as defendants, J.A. 127-28; and through the court's recognition of the substantiality of petitioners' § 1983 due process claim in its denial of respondents' motion to dismiss, J.A. 177-88.

The substantiality of petitioners' equal protection claim was also expressly recognized by the district court, A. 42-43:

> [Respondents give] little significance to [petitioners'] allegation of discriminatory treatment in violation of the equal protection claim [in] the second amended complaint and of the 42 United States Code, Section 1983 claim. I want to add there I find that the equal protection claim is colorable and non-frivolous. Be that as it may, enough has been said to establish that the [petitioners] have made a substantial constitutional claim even if that claim ultimately would not have prevailed. [Petitioners] are

> therefore entitled to attorney's fees to the extent they have prevailed in an action or proceeding to enforce their 1983 claim. 42 U.S.C. § 1988.

Petitioners accordingly were held entitled to fees,[8] with petitioners' lawyer ultimately being awarded $32,109 in fees. A. 22.

The First Circuit, in the decision under review here, reversed, holding that "fees are not available here at all." A. 7. See generally 703 F.2d 4 (1st Cir. 1983). Overlooking the fact that petitioners had won significant relief throughout this litigation based on their due process claim, J.A. 27-48, 127-28, and overlooking its own earlier ob-

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8. The district court did not in its oral opinion expressly premise the fee award on the fee provision in § 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b), see A. 35, 38, but referred instead to the fee authorization in the 1976 Fees Act, 42 U.S.C. § 1988, see A. 35, 43. Viewing the proceedings as a whole, the First Circuit concluded that the district court had awarded fees under both statutory authorizations. A. 6-21.

servation that petitioners ultimately "won, as a matter of state law, all that they originally sought," see supra p. 17 note 5, the First Circuit held that petitioners' success under the EAHCA of 1975 implicitly precluded any award of fees under the 1976 Fees Act, 42 U.S.C. § 1988. A. 7-17. The First Circuit also held that petitioners' success under the EAHCA of 1975 similarly precluded any award of fees for a violation of the Rehabilitation Act, although § 505(b) of that Act as amended in 1978 expressly authorizes fees, 29 U.S.C. § 794a(b). A. 17-21.

This Court granted the petition for a writ of certiorari to review the First Circuit's denial of fees to petitioners. J.A. 199.

## SUMMARY OF ARGUMENT

This Court's unanimous decision in Maher v. Gagne, 448 U.S. 122 (1980), is control-

ling. In Maher, a prevailing plaintiff who asserted substantial constitutional claims which were not addressed was held to be entitled to fees under the 1976 Fees Act. Because petitioners here -- the prevailing plaintiffs -- asserted substantial constitutional claims which were not addressed, Maher compels that petitioners are entitled to fees under the 1976 Fees Act. This Court's reasoning in Maher further compels that petitioners, who alleged a substantial claim under § 504 of the Rehabilitation Act which similarly was not addressed, are also entitled to fees under § 505(b) of that Act.

Maher, which was neither analyzed nor distinguished by the First Circuit in its decision denying fees, requires reversal here.

I. The 1976 Fees Act authorizes an award of attorneys fees in "any action or

proceeding to enforce a provision of" § 1983. See 42 U.S.C. § 1988 (emphasis added). This litigation, brought to vindicate petitioners' constitutional rights to due process and equal protection through § 1983, is precisely such an action or proceeding.

A. When it enacted the 1976 Fees Act, Congress explained that plaintiffs with overlapping claims need not prevail on a claim entitling them to fees (e.g., a § 1983 claim) in order to be entitled to fees under the Act. Congress further explained that plaintiffs who allege a substantial constitutional claim through § 1983 which prudently is not addressed are entitled to fees so long as they prevail on a non-fee ground arising from a commmon nucleus of operative fact. Since petitioners here alleged substantial constitutional claims (i.e., that petitioner Tommy Smith was about to be excluded solely

because of his handicap from receiving a public education, in violation of equal protection, and was being excluded without a hearing, in violation of due process), and since petitioners in fact prevailed in this action or proceeding to enforce their constitutional rights, they are conclusively entitled to fees under the 1976 Fees Act. Maher v. Gagne, 448 U.S. 122 (1980).

B. Neither the absence of a fee authorization in the EAHCA of 1975, nor this Court's decision in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1 (1981), negates Congress' intent to authorize fees under the 1976 Fees Act. The fact that the EAHCA of 1975 does not itself authorize fees is not relevant in this case in view of Congress' express intent -- applied unanimously in Maher -- to authorize fees where plaintiffs prevail on an overlap-

ping non-fee claim arising from a common nucleus of operative fact. Middlesex County is inapposite to this case as there is no issue here about whether the EAHCA can be asserted through the "and laws" provision of § 1983. Rather, as this Court unanimously held in Maher, regardless of whether a federal statutory claim can be asserted through the "and laws" provision of § 1983, prevailing plaintiffs who assert substantial constitutional claims are entitled to fees under the 1976 Fees Act.

II. Section 505(b) of the Rehabilitation Act as amended in 1978, authorizes an award of attorneys fees in "any action or proceeding to enforce or charge a violation of a provision of" § 504. See 29 U.S.C. § 794a(b) (emphasis added). This litigation, in which petitioners sought to enforce and did charge a core violation of § 504, is such

an action or proceeding.

A. When Congress enacted § 505(b) in 1978, it incorporated into that fee authorization the legislative history of the 1976 Fees Act. Since petitioners here alleged a substantial claim under § 504 (i.e., that petitioner Tommy Smith was about to be excluded from participation in a federally funded program solely by reason of his handicap) and since petitioners prevailed in this action or proceeding to enforce their § 504 rights, petitioners are conclusively entitled to fees under § 505(b) for the same reasons as in Maher.

B. Petitioners' fee entitlement under § 505(b) is not affected by the omission of a fee authorization in the EAHCA of 1975 in view of Congress' express authorization of fees in 1978 for plaintiffs who

prevail in any action or proceeding to enforce or charge a violation of § 504. Middlesex County is totally irrelevant to this case in which petitioners asserted their substantial § 504 claim directly through the private right of action in § 505(a)(2) enacted by Congress in 1978 and not through the "and laws" provision of § 1983. Since Congress in 1978 expressly authorized fees for prevailing plaintiffs who allege a substantial § 504 claim, petitioners are entitled to fees under this Court's reasoning in Maher.

## ARGUMENT

### I. Petitioners, Who Alleged Substantial Due Process and Equal Protection Claims Through § 1983 and Who Ultimately Obtained All of the Relief Sought, Are Entitled To Fees Under the 1976 Fees Act

The 1976 Fees Act, 42 U.S.C. § 1988, authorizes an award of fees to the prevailing party in "any action or proceeding to enforce

a provision of" 42 U.S.C. § 1983.

Through the extensive and often explicit legislative history accompanying the 1976 Fees Act, Congress explained -- and this Court unanimously agreed in Maher v. Gagne, 448 U.S. 122 (1980) -- that plaintiffs with multiple, overlapping claims need not prevail on a claim specifically entitling them to fees in order to be entitled to fees under the Act.[9/] Instead, plaintiffs are entitled to fees, for example, "when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), quoted

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9. This does not necessarily mean that a prevailing plaintiff with multiple claims will be entitled to fees for time spent by counsel on all claims. Hensley v. Eckerhart, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Nevertheless, as this Court pointed out in Hensley, plaintiffs with overlapping claims cross the "statutory threshold" to fee entitlement "'if they succeed on any significant issue in litigation which achieves some of the benefit sought in bringing suit.'" 103 S.Ct. at 1939, 76 L.Ed.2d at 50, quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978).

with approval in Maher v. Gagne, 448 U.S. at 129.[10] Similarly, a plaintiff who asserts substantial constitutional claims through § 1983 and who "prevails on the non-fee claim arising out of a 'common nucleus of operative fact,'" is also entitled to fees. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n.7 (1976), quoted with approval in Maher v. Gagne, 448 U.S. at 132 n.15.

Petitioners here alleged substantial constitutional claims which were not ultimately ruled on in view of the fact that they had already obtained the result sought through their lawsuit. The legislative history of the 1976 Fees Act, to which this

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10. See also, e.g., Nadeau v. Helgemoe, 581 F.2d 275, 279-81 (1st Cir. 1978) (plaintiffs who obtained some of the benefit sought through a consent decree are entitled to fees); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 429 (8th Cir. 1970) (although "we find no injunction warranted here, we believe [plaintiff's] lawsuit acted as a catalyst" through which plaintiff obtained some of the benefit sought and was therefore entitled to fees), cited in S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), and in H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

Court has repeatedly deferred in resolving fee issues such as are present in this case,[11] compels the conclusion that petitioners were properly awarded fees by the district court.

### A. As This Court Held in Maher v. Gagne, Congress Expressly Authorized Fees Under the 1976 Fees Act for Prevailing Plaintiffs Who Allege Substantial Constitutional Claims Which Are Not Addressed By the Trial Court

When Congress enacted the 1976 Fees Act to authorize an award of fees to the prevailing party in "any action or proceeding to enforce a provision of" § 1983, see 42 U.S.C. § 1988 (emphasis added), Congress specifically sought to benefit persons who claim depri-

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11. See, e.g., Maher v. Gagne, 448 U.S. 122, 129, 132 n.15 (1980) (relying on the Senate Report at 5, and on the House Report at 4 n.7); New York Gaslight Club v. Carey, 447 U.S. 54, 70-71 n.9 (1980) (relying on the House Report at 5, 8 n.16); Hanrahan v. Hampton, 446 U.S. 754, 756-58 (1980) (relying on the Senate Report at 2, 5; and on the House Report at 4, 7, 8); Hutto v. Finney, 437 U.S. 678, 694 n.23 (1978) (relying on the House Report at 4 n.6).

vations of their constitutional rights.[12] Recognizing that constitutional claims often overlap with non-constitutional issues which are dispositive, Congress took care to authorize fees for prevailing plaintiffs so long as their constitutional claims are substantial. This is such a case.

1. Through the House Report accompanying the 1976 Fees Act, Congress explained that plaintiffs, who prevail in a context in which their constitutional claim is not addressed, should not be penalized by a denial of fees. Instead, where the unaddressed claim is a substantial constitutional claim,

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12. Entirely apart from any fee entitlement for plaintiffs who prevail on a non-fee statutory claim asserted through the "and laws" provision of § 1983 -- a question not presented in this case, see infra p.56 note 23 -- fees under the 1976 Fees Act were unquestionably intended for plaintiffs who claim deprivations of constitutional rights. As summarized by this Court in Maine v. Thiboutot, 448 U.S. 1, 9 (1980): "As was true with § 1983, a major purpose of the Civil Rights Attorney's Fees Awards Act was to benefit those claiming deprivations of constitutional civil rights."

fees are expressly authorized so long as the prevailing non-fee claim was overlapping, i.e., so long as it arose from a common nucleus of operative fact:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v. Lavine, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, supra, at 725.

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n.7 (1976), quoted with approval in Maher v. Gagne, 448 U.S. at 132 n.15.

2. This express congressional intent

was held by this Court to be dispositive, in a context virtually identical to that here, in Maher v. Gagne. In fact, the foregoing legislative history was dispositive in two respects.

First, in determining whether Congress had authorized fees in a settled case in which there allegedly had been no constitutional or civil rights claim, this Court corrected defendant's mischaracterization of plaintiff's claim and unanimously held that plaintiff was entitled to fees under the 1976 Fees Act because she had alleged due process and equal protection claims which were found to be substantial but were not addressed by the lower courts. 448 U.S. at 128 n.10.[13]

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13. The majority in Maher also recognized, as an alternative holding, that plaintiff's Social Security Act claim fell within the meaning of the "and laws" language of § 1983 in view of Maine v. Thiboutot, 448 U.S. 1 (1980), and that plaintiff for this reason was also entitled to fees under the 1976 Fees Act. 448 U.S. at 128-29.

Three concurring Justices would not have reached this alternative "and laws" reason for granting fees [cont'd. on next pg]

Second, this Court in Maher rejected defendant's eleventh amendment defense by relying on the foregoing legislative history to hold that Congress had acted within its enforcement power when it authorized fees for plaintiffs who prevail on an overlapping non-constitutional claim.

> [C]learly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided. We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.

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since, in their view, plaintiff's assertion of "a substantial constitutional claim which 'remained in the case until the entire case was settled,'" was sufficient to entitle plaintiff to an award of fees. 448 U.S. at 134 (opinion of Justice Powell, joined by the Chief Justice and Justice Rehnquist, concurring in the judgment) (citation omitted).

448 U.S. at 132 (footnote omitted). In an accompanying footnote, the Court stated that the "legislative history makes it clear that Congress intended fees to be awarded where a . . . constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the [1976 Fees] Act," and thereafter quoted the relevant legislative history from the House Report in full. 448 U.S. at 132 n.15.

3. Based on Congress' intent and more recently on this Court's unanimous decision in Maher v. Gagne, the courts of appeals have widely ruled that plaintiffs are entitled to fees where they assert a substantial constitutional claim but prevail on a non-fee state law issue,[14] or on a non-fee federal

14. See, e.g., Milwe v. Cavuoto, 653 F.2d 80, 84 (2d Cir. 1981) (successful state law tort claim coupled with a claim for unconstitutional use of excessive [cont'd. on next pg]

claim,[15] including a non-fee federal EAHCA claim.[16] As the courts of appeals have

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force); Seals v. Quarterly County Court of Madison County, 562 F.2d 390, 392-94 (6th Cir. 1977) (successful state law claim coupled with unaddressed vote dilution claims under the fourteenth and fifteenth Amendments); cf. Kimbrough v. Arkansas Activities Ass'n, 574 F.2d 423, 426-27 (8th Cir. 1978) (success through interpretation of ambiguous rules and regulations coupled with unaddressed due process and equal protection claims).

15. See, e.g., Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1124-25 (9th Cir. 1981) (successful claim under the Federal Aid for Highways Act coupled with unaddressed due process and equal protection claims); cf. Doe v. Marshall, 622 F.2d 118, 119-20 (5th Cir. 1980) (successful claim under the Rehabilitation Act prior to the 1978 amendment authorizing fees).

Prior to this Court's decision in Maine v. Thiboutot, 448 U.S. 1 (1980), the courts of appeals had held that plaintiffs were entitled to fees where they assert substantial constitutional claims but prevail on a non-fee Social Security Act claim. See, e.g., Oldham v. Ehrlich, 617 F.2d 163, 166-68 (8th Cir. 1980) (successful Social Security Act claim coupled with unaddressed equal protection claim); Holley v. Lavine, 605 F.2d 638, 646 (2d Cir. 1979) (successful Social Security Act claim coupled with unaddressed equal protection claim), cert. denied, 446 U.S. 913 (1980); Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978) (successful claim under the Social Security Act coupled with unaddressed fourteenth amendment claim); cf. Bond v. Stanton, 555 F.2d 172, 174 (7th Cir. 1977) (successful Social Security Act claim asserted through § 1983), cert. denied, 438 U.S. 916 (1978).

[cont'd. on next pg]

generally recognized, awarding fees in these situations, besides being required, serves Congress' purpose of encouraging vindication of constitutional rights.[17]

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16. See, e.g., Espino v. Besteiro, 708 F.2d 1002, 1006-10 (5th Cir. 1983) (successful EAHCA claim coupled with unaddressed due process and equal protection claims); Monahan v. Nebraska, 687 F.2d 1164, 1172 (8th Cir. 1982) (successful EAHCA claim coupled with unaddressed due process claim), cert. denied, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); Robert M. v. Benton, 671 F.2d 1004, 1005-06 (8th Cir. 1982) (successful EAHCA claim coupled with unaddressed due process and equal protection claims); Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir. 1982) (successful EAHCA claim coupled with unaddressed fourteenth amendment claims); cf. Hastings v. Maine-Endwell Central School Dist., 676 F.2d 893, 897 (2d Cir. 1982) (successful EAHCA claim and successful due process claim); contra Department of Educ. v. Katherine D., No. 82-4096 (9th Cir. Nov. 7, 1983).

17. See e.g., Espino v. Besteiro, 708 F.2d 1002, 1010 (5th Cir. 1983) (allowing "a court to deny § 1988 fees by granting relief on the basis of a non-fee statute would . . . undermine Congress' intent in enacting § 1988 to create an incentive for plaintiffs to vindicate violations of their constitutional rights by bringing § 1983 actions."). The Fifth Circuit also pointed out, as a policy consideration, that a denial of fees to plaintiffs who prevail through judgment other than on their constitutional claim would provide defendants with a "powerful disincentive to settlement" in view of the fact that plaintiffs who allege substantial constitutional claims and who ultimately prevail through settlement are entitled to fees. Id.

4. Congressional intent, this Court's decision in Maher, and the foregoing authority conclusively establish petitioners' fee entitlement here since petitioners asserted substantial constitutional claims which the district court ultimately and properly did not address in view of petitioners' dispositive success resulting from the construction of two state statutes.

The substantiality of petitioners' due process claim was established by the due process injunctive relief enjoyed by petitioners throughout this litigation, J.A. 27-48, 127-28; and by the district court's denial of respondents' motion to dismiss on the ground that the appropriateness of petitioners' § 1983 due process cause of action was the law of the case, J.A. 179.

As to petitioners' equal protection claim of discriminatory exclusion from

school, the district court specifically found that "the equal protection claim is colorable and non-frivolous," and that accordingly "enough has been said to establish that the [petitioners] have made a substantial constitutional claim." A. 13.[18/]

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18. Even without these rulings and findings, the substantiality of petitioners' due process and equal protection claims was evident from contemporaneous court decisions.

The discriminatory exclusion from school of handicapped children in factual contexts similar to that of petitioner Tommy Smith led to the seminal constitutional decisions in Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866, 874-76 (D.D.C. 1972) (holding that such exclusion violates equal protection and due process), and in Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 293-97 (E.D. Pa. 1972) (three-judge court) (holding that such exclusion gives rise to substantial due process and equal protection claims). Similar court decisions, recognizing that a free education is a matter of constitutional right for handicapped children, followed Mills and PARC. See, e.g., Lebanks v. Spears, 60 F.R.D. 135, 137-38 (E.D. La. 1973) (approval of a consent decree as required by minimal constitutional guarantees of due process and equal protection); cf. Kruse v. Campbell, 431 F. Supp. 180, 186-89 (E.D. Va. 1977) (three-judge court) (state exclusion of handicapped children from a free appropriate education violates equal protection), vacated and remanded "with direction to decide the claim based on the federal statute § 504 of the federal Rehabilitation Act of 1973," 434 U.S. 808 (1977).

The substantiality of petitioners' equal protec- [cont'd. on next pg]

Subsequent to its preliminary rulings in petitioners' favor on their due process claim, the district court followed well established judicial policy by avoiding an unnecessary ruling on constitutional claims where the resolution of non-constitutional issues may be and ultimately is dispositive.[19] The

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tion and due process claims is also evident from the decisions by this Court in such cases as Plyler v. Doe, 457 U.S. 202 (1982) (equal protection); Carey v. Piphus, 435 U.S. 247 (1978) (due process); and Wood v. Strickland, 420 U.S. 308 (1975) (due process).

19. This judicial policy was summarized by Justice Brandeis nearly fifty years ago in Ashwander v. TVA, 297 U.S. 288, 347 (1936): federal courts "will not pass upon a constitutional question although properly presented in the record, if there is also present some other ground upon which the case may be disposed of."

Well before Justice Brandeis' articulation of this policy, the Court had applied the policy to prefer an initial construction of a state statute so as to possibly avoid adjudication of constitutional issues. Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909); cf. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

This longstanding judicial policy was more recently applied by this Court to encourage initial adjudication of the statutory rights -- as opposed to the constitutional rights -- of handicapped children to a free public education. See Campbell v. Kruse, 434 U.S. 808 (1977), vacating and remanding 431 F. Supp. 180 (E.D. Va. 1977) (three-judge court), discussed supra p.41 note 18.

district court here adhered to this judicial policy on two occasions. Initially, after observing that petitioners "already enjoy preliminary injunctive relief" based on their due process claim, J.A. 121, the district court certified to the Rhode Island Supreme Court two state law questions "in order to avoid unnecessary adjudication of constitutional and federal claims," J.A. 122, 124-25.

The policy objective properly pursued by the district court was in fact achieved through the Rhode Island Supreme Court's decision rendered in favor of petitioners' position. J.A. 129-51. As the district court stated in its final order on the merits:

> In accordance with the Rhode Island Supreme Court's opinion in Smith v. Cumberland School Committee, ___ R.I. ___, 415 A.2d 168 (1980), Tommy is entitled to have the full cost of said special education and related services paid by the Cumberland School Committee so long as he is of qualifying

age and resides in the Cumberland School District.

J.A. 191-92 The district court thus ultimately avoided an unnecessary ruling on the federal statutory and constitutional issues: "It having been established that Thomas Smith III was, and is, entitled to be educated at the cost of the Cumberland School Committee as a matter of state law, plaintiffs have obtained the object of their suit and it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims." J.A. 193.

Since petitioners obtained more than just "some of the benefit the parties sought in bringing suit," Hensley v. Eckerhart, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50 (1983), petitioners were prevailing parties entitled to fees. As this Court concluded in Maher v. Gagne, 448 U.S. at 133 (citation omitted), in approving a fee award for a plaintiff who

ultimately prevailed by the same non-constitutional route as petitioners here prevailed: "such a fee award 'furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.'"

### B. The Existence of Overlapping Rights Under the Constitution and Under the EAHCA Has No Affect on Congress' Authorization of Fees Under the 1976 Fees Act.

Disregarding Congress' intent and this Court's unanimous decision in Maher v. Gagne, 448 U.S. 122 (1980), the First Circuit reversed the district court's fee award and held that petitioners were not entitled to fees under the 1976 Fees Act. A. 7-17.

The First Circuit reached this decision through two mistatements of the applicable law. First, the court of appeals held that

there was no congressional intent to authorize fees to plaintiffs who assert unaddressed substantial constitutional claims and prevail on an overlapping claim under a federal statute which itself does not expressly authorize fees. Second, the court of appeals held that support for its position could be found in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1 (1981).

In addition to the fact that both grounds asserted by the First Circuit were premised upon a mischaracterization of the manner in which petitioners ultimately prevailed in this case,[20] there is no legal

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20. According to the First Circuit, petitioners ultimately prevailed not through interpretations of state law but instead under the EAHCA: "Not only was [the] EAHCA the foundation of [petitioners'] victory," A. 9, but it was the EAHCA under which relief was obtained here," A. 11.

The First Circuit's mischaracterization of the various court rulings granting petitioners' success in this case is evident from those rulings, including an earlier ruling by the First Circuit. The district court, in its order certifying the two state law issues to the Rhode Island Supreme Court, stated that certification was being undertaken "in order to avoid [cont'd. on next pg]

support for the result reached by the First Circuit either in its decision or as a matter of law.

1. Premised upon its mistaken view of the manner in which petitioners prevailed, see supra pp.46-47 note 20, the First Circuit

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unnecessary adjudication of constitutional and federal claims." J.A. 122, 124-25. The Rhode Island Supreme Court, in its decision favorable to petitioners, ruled only on the two state law questions which had been certified to it. J.A. 129-51. The district court thereafter, in its final order on the merits, held that "as a matter of state law, plaintiffs have obtained the object of their suit and it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims." J.A. 193. And the First Circuit, in its unreported decision affirming the final orders on the merits, pointed out that petitioners had "won, as a matter of state law, all that [they] originally sought." See supra p.17 note 5.

To be sure, the strength of petitioners' federal claim under the EAHCA no doubt contributed to their ultimate victory under state law. J.A. 119, 134-38. Yet, the same may be said about the strength of petitioners' overlapping federal claim under § 504 of the Rehabilitation Act, as well as about the strength of petitioners' due process and equal protection claims. The fact of the matter, however, is that petitioners ultimately prevailed without a final adjudication of either their constitutional claims or their federal statutory claims.

held that petitioners' success under the EAHCA, a federal statute which does not itself expressly authorize fees, barred petitioners from receiving fees since Congress nowhere indicated its intent to allow fees where the same facts give rise to substantial constitutional claims which are not addressed. As the First Circuit explained:

> The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to Thomas because of his handicap, are factually identical to the EAHCA claims . .. . Because Congress, in providing statutory remedies for the same factual complaints, did not authorize attorneys' fees for such actions, we do not believe that section 1988 is a sufficient basis for the granting of attorneys' fees here.

A. 15-16. Stated otherwise, "the question before us remains one of finding affirmative congressional sanction for fees in this situation. We can find none." A. 11.

The affirmative congressional sanction

which the First Circuit overlooked, and in fact never cited, is found in the House Report accompanying the 1976 Fees Act -- enacted one year after the EAHCA of 1975 -- which expressly authorizes fees in this overlapping situation "so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'" H.R. Rep. No.1558, 94th Cong., 2d Sess. 4 n.7 (1976). See supra p.34. As this Court concluded in Maher v. Gagne, 448 U.S. 122, 132 n.15 (1980): "The legislative history makes it clear that Congress intended fees to be awarded where a . . . constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act."

The First Circuit, in effect, turned congressional intent and this Court's unanimous decision in Maher on their heads since the First Circuit used the very predicate for

fee entitlement -- a substantial constitutional claim which overlaps with a non-fee statutory claim arising from a common nucleus of operative fact -- as the reason for denying fees. This paradoxical result is unquestionably wrong as it completely contradicts both Congress' intent and this Court's decision in Maher.

2. Premised again upon its view that petitioners prevailed exclusively under the EAHCA of 1975, see supra 46-47 note 20, and flowing from its misperception that Congress had not authorized fees under the 1976 Fees Act where substantial constitutional claims are asserted, see supra at pp.47-49, the First Circuit stated that "support" for its legal view was "found in the Supreme Court's recent discussion of section 1983 in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1, 101 S.Ct.

2615, 69 L.Ed.2d 435 (1981)." A. 13. Apparently unaware that this Court in Middlesex County held only that the substantive federal statutory rights at issue there could not themselves be asserted through the "and laws" provision of § 1983, the First Circuit illogically concluded not that the EAHCA of 1975 could not be asserted through the "and laws" provision of § 1983, but rather that the EAHCA of 1975 somehow precludes the availability of fees under the 1976 Fees Act for prevailing plaintiffs who assert substantial constitutional claims through § 1983.[21] In

21. The First Circuit quite specifically held "only that where, as here, the constitutional allegations arise from the same factual underpinnings as the [EAHCA] statutory claims, section 1988 does not apply." A. 17 (emphasis added).

In reaching this decision as to fee entitlement, the First Circuit recognized that the EAHCA does not "in any way limit the substantive scope of a handicapped child's constitutional rights" which still can be asserted through § 1983. A. 17. But see Department of Educ. v. Katherine D., No. 82-4096 (9th Cir. Nov. 7, 1983). This part of the First Circuit's decision is, of course, entirely correct, since Congress' purpose in enacting the EAHCA under the Spending Clause was to assist those states which accept [cont'd. on next pg]

the First Circuit's profoundly mistaken

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EAHCA funding in meeting their established legal obligations to handicapped children, not to supplant the enforcement of handicapped children's constitutional rights through § 1983. Nothing in the legislative history of the EAHCA of 1975, in fact, supports any limitation on the enforcement of constitutional rights through § 1983.

Congress' recognition of the presumed enforceability of the constitutional rights of handicapped children appears throughout the legislative history accompanying the EAHCA. At the outset, Congress recognized that its consideration of the EAHCA "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S. Rep. No. 168, 94th Cong., 2d Sess. 6 (1975). Two of the landmark cases, Mills v. Bd. of Educ. of the District of Columbia, 348 F. Supp. 866 (D.D.C. 1972), and Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972), both of which established that the exclusion of handicapped children from a free public education violates equal protection and due process, were repeatedly cited by Congress. See S. Rep. No. 168, 94th Cong., 1st Sess. 6-7, 22-23 (1975); H.R. Rep. No.332, 94th Cong., 1st Sess. 3-4 (1975); see generally Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 180 n.2, 192-200 (1982).

Based on Congress' belief that these landmark "court orders must be implemented," S. Rep. No. 168, 94th Cong., 1st Sess. 17 (1975), Congress enacted the EAHCA "to provide assistance to States in carrying out their responsibilities under State law and the Constitution of the United States," id. at 13 (emphasis added); see also 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams); id. at 19504 (remarks of Sen. Humphrey). Congress in fact could not have been more explicit in its intent that the new EAHCA funding, as well as other federal funding, be utilized by "States to assist them in carrying out their responsibilities

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view: "The fact that the section 1983 claims

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under State laws, State Constitutions, and the U.S. Constitution," S. Rep. No. 168, 94th Cong., 1st Sess. 23 (1975) (emphasis added).

By providing judicial review to insure that participating states were complying with the restrictions which accompanied the use of EAHCA funding, see Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 204-08 (1982), Congress did not eliminate wholesale the enforcement of the state and other federal statutory rights of handicapped children, much less enforcement of their federal constitutional rights through § 1983. Congress quite specifically recognized that it was "discriminatory treatment and exclusion which Court cases [and] State and Federal laws are designed to remedy." S. Rep. No. 168, 94th Cong., 1st Sess. 27-28 (1975). And, lest there be any doubt, Congress specifically stated that it did "not intend" EAHCA enforcement "to limit the rights of individuals to seek redress of grievances through other avenues such as bringing civil actions[s] in Federal or State courts to protect and enforce the rights of handicapped children under applicable law." Id. at 26.

This express congressional recognition and preservation of the alternative judicial remedies available to handicapped children forecloses any inference that Congress in 1975 intended through enactment of the EAHCA to repeal by implication all other means of enforcing the rights of handicapped children. See Morton v. Mancari, 417 U.S. 535, 549-50 (1974); Posadas v. National City Bank, 296 U.S. 497, 503 (1936). Congressional intent, of course, is controlling. Id; compare Johnson v. Railway Express Agency, 421 U.S. 454, 459-61 (1974), and Jones v. Alfred H. Mayer Co., 392 U.S. 409, 416-17 (1968), with Brown v. General Services Admin., 425 U.S. 820, 825-29 (1976).

Even if Congress had manifested a contrary intent, it still could not eliminate the enforceability of constitutional rights through § 1983 without

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alleged here are based upon independent constitutional violations rather than the EAHCA itself is immaterial." A. 15.

The First Circuit's reasoning again is absolutely wrong since Middlesex County has no relevance to this case. The First Circuit's mistake is apparent from Middlesex County itself, a case in which this Court addressed only the question of whether the right of action allowed through the "and laws" provision in § 1983, see Maine v. Thiboutot, 448 U.S. 1 (1980), encompassed two federal water pollution statutes. See 453

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expressly amending § 1983. As this Court held in an analogous context: although "Congress deliberately provided no damages remedy in the Public Accommodations Act itself," although Congress specified "that the injunctive remedy of § 206 [of the Act] was the 'exclusive means of enforcing the rights based on'" the Act, and although "the legislative history makes quite plain that Congress did not intend that violations of the Public Accommodations Title be enforced through the damages provision of § 1983," it nonetheless is "evident that enforcement of one's constitutional rights under § 1983 is not 'inconsistent' with the Public Accommodations Act." Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-51 n.5 (1970).

U.S. at 19-21. Answering this question of legislative intent in the face of total congressional silence, this Court concluded that the "comprehensive enforcement mechanisms" in the federal statutes demonstrated that "Congress intended" to foreclose the assertion of those statutes through the "and laws" provision of § 1983.[22/] 453 U.S. at 20-21.

Although the exception to the "and laws" provision of § 1983 recognized in Middlesex County might be relevant where a plaintiff attempts to enforce the EAHCA through the "and laws" provision of § 1983, there is no

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22. In examining this question, the Middlesex County Court pointed out that it had "recognized two exceptions to the application of § 1983 to statutory violations." 453 U.S. at 19. Those exceptions, initially proposed in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 67 (1981), flow from determinations about "(i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable 'rights' under § 1983." 453 U.S. at 19. Neither of these questions has any relevance to the availability of fees pursuant to congressional authorization, or to the enforceability of constitutional rights through § 1983.

"and laws" issue in this case.[23] Middlesex County accordingly is inapposite, as it could have no legal effect upon the validity of Congress' decision in 1976 to authorize fees to prevailing plaintiffs who allege substantial constitutional claims through § 1983.

Congressional intent here is unambiguous. Congress in 1976 expressly authorized fees in "any action or proceeding to enforce a provision of" § 1983 where the prevailing plaintiffs allege unaddressed substantial constitutional claims. This authorization conclusively establishes both Congress' awareness of the occasional overlap of constitutional and statutory rights, and also Congress' intent to make fees available to

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23. Petitioners' EAHCA claim in this case was asserted directly and only through the express right of action contained in § 615(e)(2) of the EAHCA, 20 U.S.C. § 1415(e)(2). See J.A. 50, 153.

There thus has never been an "and laws" argument in this case, Cert. Pet. at 13-14 n.3, 19 n.6, and petitioners accordingly did not present such a question to this Court, Cert. Pet. at i-ii.

prevailing plaintiffs in this context without disturbing the established rule of avoiding constitutional adjudications wherever possible. Lest there be any doubt, in Maher v. Gagne, 448 U.S. 122 (1980) -- decided the same day as Maine v. Thiboutot, 448 U.S. 1 (1980) -- this Court relied on the foregoing congressional intent in unanimously holding that, apart from any entitlement to fees flowing from plaintiff's assertion of a federal statutory claim through the "and laws" provision of § 1983, the plaintiff in any event was entitled to fees under the 1976 Fees Act because plaintiff had alleged substantial though unaddressed constitutional claims. 448 U.S. at 128 n.10 & 132 n.15 (majority opinion); id. at 134 (concurring opinion).

As Justice Stevens pointed out in his majority opinion in Maher, "even if the Court had reached the opposite result in Thiboutot"

by holding that the federal statute could not be asserted through § 1983, the plaintiff in Maher still was entitled to fees based on her unaddressed constitutional claims. 448 U.S. at 128 n.10. Justice Powell, in his concurring opinion, agreed since "Congress has made plain its intent that fees be awarded to 'prevailing' parties in these circumstances." Id. at 134. These are the same circumstances here.

## II. Apart From Petitioners' Fee Entitlement Under the 1976 Fees Act, Petitioners Are Entitled to Fees Under the 1978 Fee Authorization in the Rehabilitation Act

Section 505(b) of the Rehabilitation Act as amended in 1978, 29 U.S.C. § 794a(b), authorizes an award of fees to the prevailing party in "any action or proceeding to enforce or charge a violation of" § 504 of the Rehabilitation Act, 29 U.S.C. § 794. When Congress enacted this fee authorization in

1978[24/] -- two years after the enactment of the 1976 Fees Act, and three years after enactment of the EAHCA of 1975 -- Congress explained that prevailing plaintiffs are entitled to fees under § 505(b) in the same manner that prevailing plaintiffs are entitled to fees under the 1976 Fees Act.

Petitioners here alleged a substantial claim under § 504 of the Rehabilitation Act; they enjoyed a private right of action under § 505(a)(2) to enforce that claim, see infra pp. 71-72 note 31; and they in fact prevailed in this action or proceeding. They accordingly are entitled to fees under § 505(b)

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24. The 1978 fee provision was contained in the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2982, which amended the Rehabilitation Act of 1973 by adding § 505(b) authorizing fees. The fee provision was reported favorably in the Senate Report [S. Rep. No. 890, 95th Cong., 2d Sess. 19-20 (1978)], the House Report [H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21 (1978)], and the Conference Report [H.R. Rep. No.1780, 95th Cong., 2d Sess. 93 (1978)]. It was explained in considerable detail on the floor of the Senate, see infra pp.61-62 note 26.

based on congressional intent and on the unanimous reasoning of this Court in Maher v. Gagne, 448 U.S. 122 (1980).

### A. Congress Expressly Authorized Fees Under § 505(b) of the Rehabilitation Act, as Amended in 1978, for Prevailing Plaintiffs Who Allege Substantial Claims Under § 504 of the Rehabilitation Act

The fee authorization in § 505(b) of the Rehabilitation Act, 29 U.S.C. § 794a(b), contains language which is virtually identical to that in the 1976 Fees Act, 42 U.S.C. § 1988.[25] In enacting § 505(b), Congress not only explained that it intended § 505(b) to

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25. The fee authorization in § 505(b) provides as follows:

> In any action or proceeding to enforce or charge a violation of a provision of [§ 504], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. § 794a(b) (emphasis added). With the exception of the words which are underscored or bracketed above, the language in § 505(b) is identical to that in the 1976 Fees Act, 42 U.S.C. § 1988.

be interpreted in the same manner as the 1976 Fees Act, but also incorporated into § 505(b) the legislative history of the 1976 Fees Act.[26] In view of congressional intent --

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26. Senator Cranston, the author of § 505(b), fully explained the coverage and effect of this fee authorization in his remarks on the floor of the Senate:

> Mr. President, an amendment which I have authored, contained in section 505(b) of the reported bill, provides for the allowance of attorneys' fees by a court as part of the costs to the prevailing party, other than the United States, and parallels the Civil Rights Attorneys' Fees Awards Act of 1976 (Public Law 94-559).
>
> * * *
>
> Mr. President, I emphasize that it is intended that interpretation of the attorney's fee provision in the committee bill be analagous to interpretations of the Civil Rights Attorney's Fees Act of 1976, Public Law 94-559. The legislative history and expressions of legislative intent with respect to Public Law 94-559 are applicable to the new section 505(b).

124 Cong. Rec. 30346 (1978). See also id. at 30347.

Subsequent to passage by the Senate and by the House and subsequent to the House-Senate Conference, see supra p.59 note 24, the fee provision was explained again on the floor of the Senate, this time by Senator Stafford, the ranking member of the Subcommittee on the Handicapped. Senator Stafford initially observed that "section 505(b) of the conference bill provides for the allowance of attorneys' fees by a court as part of the costs to the prevailing party, other than the United States and parallels the Civil Rights Attorneys' Fees Awards Act of 1976 (P.L. 94-

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articulated in 1978 and in 1976 -- petitioners are entitled to fees under § 505(b).

1. As this Court pointed out in Maher v. Gagne: "Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that 'for purposes of the award of counsel fees, parties may be considered to have prevailed

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559)." 124 Cong. Rec. 37507 (1978). He then stated: "I emphasize that it is intended that interpretation of the attorney's fees provision in the conference bill be analogous to interpretations of the Civil Rights Attorney's Fees Act of 1976; Public Law 94-559. The legislative history and expressions of legislative intent with respect to Public Law 94-559 are applicable to the new section 505(b)." Id. at 37508.

The legislative history of the Fees Act accordingly is fully applicable to fee awards under the Rehabilitation Act. This is also true because of the fact that the Fees Act "is legislation similar in purpose and design to [the Rehabilitation Act's] fee provision." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980).

when they vindicate rights through a consent judgment or without formally obtaining relief.'" 448 U.S. at 129, quoting from S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976); see also H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

This congressional intent not only was incorporated into § 505(b), see supra pp.61-62 note 26, but also expressly accompanied the enactment of § 505(b): "a party should be considered to have prevailed when rights are vindicated . . . through a consent judgment or, even, without the granting of formal relief." 124 Cong. Rec. 30347 (1978) (remarks of Sen. Cranston); see also 124 Cong. Rec. 37508 (1978) (remarks of Sen. Stafford).

2. Petitioners here both vindicated their rights and prevailed in "an action or proceeding to enforce or charge a violation

of" § 504. They accordingly are ordinarily entitled to fees under § 505(b), as the First Circuit recognized below, so long as they presented "a substantial section 504 claim even if they [did] not ultimately prevail under that claim. United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980)." A. 18.[27/]

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27. See also, e.g., Disabled in Action v. Mayor of Baltimore, 685 F.2d 881 (4th Cir. 1982); Pratt v. Bd. of Educ. of Frederick County, 674 F.2d 259 (4th Cir. 1982).

This standard, under which prevailing plaintiffs are entitled to fees so long as they assert a substantial but unaddressed § 504 claim, is consistent with congressional intent both under § 505(b) of the Rehabilitation Act and under the 1976 Fees Act, see supra pp. 62-63, and is also consistent with the standard which authorizes fees under the 1976 Fees Act for prevailing plaintiffs who assert substantial but unaddressed constitutional claims, see supra pp.29-58.

This standard for authorizing fees is distinguishable from situations where courts are otherwise obligated to rule on a separate substantial claim under a federal statute which also authorizes fees. See Morales v. Haines, 486 F.2d 880 (7th Cir.1973) (since the district court declined to address plaintiff's separate claim of racial discrimination in housing under Title VIII of the Civil Rights Act of 1968, and also failed to address plaintiff's attendant prayer under Title VIII for compensatory damages, punitive damages, and attorneys fees, the case must be remanded for findings as to discrimination, as to [cont'd. on next pg]

In this case, involving Tommy Smith's exclusion from a program or activity receiving federal financial assistance solely because he was emotionally disturbed as well as orthopedically impaired, there is no question that petitioners presented a substantial claim under under § 504, nor should there be any doubt that they in fact would have prevailed under § 504 had the district court

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damages if any, and hence also as to Title VIII fee entitlement).

Relying on Morales, Congress indicated through the legislative history accompanying the 1976 Fees Act that a plaintiff in this situation, who prevails as did the plaintiff in Morales on a non-fee claim, "is entitled to a determination [on the claim accompanied by the fee authorization] for the purpose of awarding counsel fees. Morales v. Haines, 486 F.2d 880 (7th Cir. 1973)." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4 n.7 (1976). Morales in this context defines congressional intent, see Hensley v. Eckerhart, 103 S.Ct. 1933, 1936-38, 76 L.Ed.2d 40, 48-49 (1983), as requiring a ruling on a fee claim only where separate substantive rights and additional remedies which flow therefrom have not been addressed. Congress thus did not require a ruling on a separate statutory claim solely for the purpose of determining fee entitlement since, as a general principle, prevailing plaintiffs with unaddressed substantial claims are entitled to fees.

chosen to address that claim rather than avoiding a ruling on petitioners' federal claims. At its core, § 504 bars discriminatory exclusion of handicapped individuals.[28] Petitioners accordingly presented a substantial and prevailing § 504 claim

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28. The language of § 504 itself dictates such a result:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794 (emphasis added). See, e.g., John A. v. Gill, 565 F. Supp. 372, 383 (N.D. Ill. 1983) ("at a minimum, § 504 requires a state which receives federal funds for public education not to exclude a handicapped child from its educational program for reasons related solely to his handicap"); see generally Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979) (§ 504 "requires . . . that an 'otherwise qualified handicapped individual' not be excluded from participation in a federally funded program 'solely by reason of his handicap'"); New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 853 (10th Cir.1982) ("close scrutiny of Southeastern Community College and other authorities reveals that a federally-funded education system may be found in violation of Section 504 where the entity's practices preclude the handicapped from obtaining system benefits realized by the non-handicapped").

without regard to the applicability of § 504 to other education issues,[29] and they thus are entitled to fees under § 505(b).

### B. The Provision of Overlapping Rights Under § 504 of the Rehabilitation Act and Under the EAHCA Has No Effect on the Availability of Fees Under § 505(b) of the Rehabilitation Act

Disregarding Congress' intent, the First Circuit held that petitioners were not entitled to a fee award under § 505(b) "for substantially the same reasons that we reject an attorneys' fees award under section 1988." A. 19. In other words, based upon its misperception that petitioners had prevailed exclusively under the EAHCA, see supra pp.46-47 note 20, the First Circuit found no congressional sanction for fees and believed

29. See generally Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1579-80 (11th Cir. 1983); Tatro v. Texas, 703 F.2d 823, 831-32 (5th Cir. 1983), cert. granted, No. 83-558 (Sup. Ct. Dec. 5, 1983); see also 34 C.F.R. §§ 104 et seq. (1980) (DOE), formerly 45 C.F.R. §§ 84 et. seq. (1978) (HEW).

that this Court's decision in Middlesex County supported a denial of fees.[30] A. 17-

30. Just as the First Circuit held that the EAHCA did not "in any way limit the substantive scope of a handicapped child's constitutitonal rights" under § 1983, A. 17, see supra pp.51-54 note 21, the First Circuit similarly held that the EAHCA did not "preclude 'overlapping' actions under section 504," A. 20. In this holding the First Circuit was plainly correct since Congress in enacting the EAHCA could not be said to have impliedly repealed Congress' prior and subsequent enactments guaranteeing enforcement of § 504 rights.

Not only is there no "clear statement" that Congress intended to repeal or supplant § 504 rights, but there instead is affirmative congressional intent to preserve enforcement of overlapping rights. For example, throughout the legislative history accompanying the EAHCA of 1975, Congress repeatedly recognized the effectiveness of and preserved all alternative means of enforcing the overlapping rights of handicapped children. See supra pp.51-54 note 21. Additionally, Congress referred specifically and approvingly to the importance of enforcing § 504 rights. S. Rep. No. 168, 94th Cong., 1st Sess. 12, 28 (1975); H.R. Rep. No. 332, 94th Cong., 1st Sess. 4 (1975).

Three years later, in 1978, Congress amended the Rehabilitation Act by adding through § 505(a)(2) an express Title VI enforcement procedure for enforcing § 504 rights, see infra pp.71-72 note 31, an action which would have been essentially meaningless in the educational context had Congress earlier intended to preclude § 504 enforcement. Congress, however, certainly did not intend to preclude § 504 enforcement, for it enacted § 505(a)(2); it referred approvingly to the then-existing § 504 regulations [45 C.F.R. §§ 84 et seq., 42 Fed. Reg. 22676 (May 4, 1977)]; and it stated that the amendment "codifies existing practice." S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978).

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21. The First Circuit erred on both counts.

1. Just as the First Circuit overlooked, and never cited, the legislative history of the 1976 Fees Act when it held that fees were unavailable under that Act to prevailing plaintiffs who vindicated their rights or who prevailed in the context of asserting substantial constitutional claims arising from a common nucleus of operative fact, the First Circuit overlooked and never cited the 1978 legislative history accompanying § 505(b).

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For these reasons, among others, the courts have widely recognized that Congress through the EAHCA and the Rehabilitation Act created concurrent rights and remedies. Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1578-80 (11th Cir. 1983); Patsel v. District of Columbia Bd. of Educ., 530 F. Supp. 660, 661-66 (D.D.C. 1982); see generally Miener v. Missouri, 673 F.2d 969, 973-75 (8th Cir. 1982), cert. denied, 103 S.Ct. 215, 74 L.Ed.2d 171 (1982); S-1 v. Turlington, 635 F.2d 342, 345-50 (5th Cir. 1981), cert. denied, 454 U.S. 1030 (1981); contra Department of Educ. v. Katherine D., No. 82-4096 (9th Cir. Nov. 7, 1983).

That 1978 legislative history, which incorporates the legislative history of the 1976 Fees Act, conclusively establishes Congress' intent to authorize fees under § 505(b) to prevailing plaintiffs such as petitioners here who vindicate their rights in "any action or proceeding to enforce or to charge a violation of a provision" of § 504 or who prevail in any such "action or proceeding" having alleged a substantial § 504 claim which was prudently not addressed. See generally Maher v. Gagne.

2. The First Circuit, proceeding without the benefit of Congress' intent in authorizing fee awards under § 505(b), purported to find support for its mistaken position in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1 (1981), by concluding that "the EAHCA's comprehensive remedial scheme entails a rejection of fee-

shifting that properly limits the fees provision of the more general Rehabilitation Act."[31/] A. 20.

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31. The First Circuit was also of the view that a denial of fees under § 505(b) was "particularly appropriate where the very existence of a private right of action under § 504 is the subject of doubt." A. 20-21. This reason for denying fees under § 505(b) is simply wrong as there unquestionably is a private right of action to enforce § 504.

Although it is true that this Court has not squarely held that § 504 is enforceable by a private right of action, Southeastern Community College v. Davis, 442 U.S. 397, 404 n.5 (1979); cf. University of Texas v. Camenisch, 451 U.S. 390 (1981), the Court certainly has implied that such a right of action does exist, Campbell v. Kruse, 434 U.S. 808 (1977), vacating and remanding 431 F. Supp. 180 (E.D. Va. 1977).

There in any event is no longer any doubt about the existence of a private right of action to enforce § 504, 29 U.S.C. § 794, in view of Congress' enactment in 1978 of § 505(a)(2), 29 U.S.C. § 794a(a)(2), which expressly incorporated the enforcement provisions of Title VI, and in view of this Court's decisions in Guardians Ass'n v. Civil Service Comm'n of New York, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), and Cannon v. University of Chicago, 441 U.S. 677 (1979).

The new § 505(a)(2), 29 U.S.C. § 794a(a)(2), provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

This enforcement provision, like the fee provision, [cont'd. on next pg]

Reliance on Middlesex County is again entirely misplaced, as is evident from the decision itself. See supra pp.50-58. This

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see supra p.59 note 24, was added to the Rehabilitation Act of 1973 by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2982. See generally Community Television of Southern California v. Gottfried, 103 S.Ct. 885, 892, 74 L. Ed.2d 705, 716 (1983).

The legislative history accompanying this enforcement provision firmly establishes Congress' intent not only that § 504 was to be enforced in the same manner as Title VI but also that § 504 was subject to a private right of action. See S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978); H.R. Rep. No. 1780, 95th Cong., 2d Sess. 93 (1978); 124 Cong. Rec. 30346-47 (1978) (remarks of Sen. Cranston); 124 Cong. Rec. 37507-08 (1978) (remarks of Sen Stafford).

Given the explicit language of § 505(a)(2) and its legislative history, § 504 may be enforced through a private right of action. Guardians Ass'n v. Civil Service Comm'n of New York, 103 U.S. 3221, 77 L.Ed.2d 866 (1983) (private right of action under Title VI for prospective relief); Cannon v. University of Chicago, 441 U.S. 677 (1979) (private right of action under Title IX because of Congress' belief that a private right of action existed under Title VI). Even prior to this Court's decision in Guardians Ass'n, the courts of appeals were virtually unanimous in their view of that a private right of action did exist under § 504. See, e.g., Miener v. Missouri, 673 F.2d 969, 973-74 (8th Cir. 1982) (citing cases), cert. denied, 103 S.Ct. 215, 74 L.Ed.2d 171 (1982); Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1376-80 (10th Cir. 1981) (citing cases); Kling v. Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980) (citing cases).

Court in Middlesex County addressed only whether the rights created by certain federal statutes could be asserted through the "and laws" provision of § 1983, see 453 U.S. at 19-21, not whether a specific statute authorizing fees for enforcement of a federal statutory right (here § 505(b) fees for enforcing § 504 rights) could be altogether eliminated by an earlier-enacted general statute (here the EAHCA of 1975).

Middlesex County, in fact, would be relevant here only if petitioners had claimed that they could enforce § 504 rights through the "and laws" provision of § 1983 and thereby obtain fees under the 1976 Fees Act. Since petitioners here never made such a claim, and since § 504 is itself enforceable by a private right of action, see supra pp.71-72 note 31, Middlesex County is simply inapposite.

Even if Middlesex County were somehow

relevant here, its test is a means to assist in determining congressional intent, not a device to defeat the will of Congress. Neither under that test, nor under any principle of statutory construction, can Congress' general action in one year be held to eliminate a specific statute enacted by Congress three years later.

The omission of fees from the EAHCA of 1975 has no debilitating effect upon Congress' decision in 1978 to authorize fees under § 505(b) in "any action or proceeding to enforce or to charge a violation of a provision of" § 504. Since petitioners alleged a substantial § 504 claim which was not addressed in this action or proceeding through which they prevailed, they are entitled to fees. Maher v. Gagne, 448 U.S. 122 (1980).

## CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the First Circuit should be reversed.

Dated: December 30, 1983

Respectfully submitted,

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# In the

# Supreme Court of the United States.

OCTOBER TERM, 1983.

THOMAS F. SMITH, JR., ET AL.,
PETITIONERS,

*v.*

WILLIAM P. ROBINSON, JR., RHODE ISLAND ASSOCIATE COMMISSIONER OF EDUCATION, ET AL.,
RESPONDENTS

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## Questions Presented.

1. Plaintiffs may not evade the lack of a fee provision in the Education For All Handicapped Children Act (the "EAHCA") by simply alleging surplus and redundant constitutional claims and equivalent claims under § 504 of the Rehabilitation Act.

2. Fees may not be awarded against a hearing officer acting under the EAHCA.

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No. 82-2120.

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1983.

THOMAS F. SMITH, JR., ET AL.,
PETITIONERS,

*v.*

WILLIAM P. ROBINSON, JR., RHODE ISLAND ASSOCIATE COMMISSIONER OF EDUCATION, ET AL.,
RESPONDENTS.

## Brief for Respondents.

### Facts of the Case.

The facts and travel of this case are adequately stated in the Court of Appeals decision in this matter. *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983). (Copy of Decision to be found as Appendix A to the Certiorary Petition, A. 1-21.)

## Argument.

### I. Petitioners are Not Entitled to Attorney Fees Simply because they Alleged Surplus "Constitutional Claims" in their Complaint.

Petitioners have conceded, for purposes of this case, that the EAHCA is not enforceable through 42 U.S.C. § 1983. In the light of this Court's prior ruling in *Middlesex Cty. Sewerage Auth.* v. *Sea Clammers*, 453 U.S. 1 (1981) and the guidance contained in *Pennhurst State School* v. *Halderman*, 451 U.S. 1 (1981) they had little choice but to make this concession. *Middlesex County* holds that when a comprehensive remedy is provided in a Federal statute an action under 42 U.S.C. § 1983 does not lie, and that the statute may only be enforced through the remedy explicitly provided by Congress. Since petitioners do not contend that the EAHCA is enforceable under 42 U.S.C. § 1983, this issue need not be discussed at length here. Still respondents note that the EAHCA is a paradigm case of a Federal statute which may not be enforced through 42 U.S.C. § 1983. An article entitled "Section 1983 and the Private Enforcement of Federal Law" states:

> *Statutes That Create Independent Private Causes of Action Against State Officials.* As suggested above, a private remedy under section 1983 should usually be denied when Congress has created an express private cause of action against state officials in the governing substantive statute. If the private cause of action in that statute is substantially identical to the section 1983 remedy, the section 1983 remedy should be presumed to have been supplanted; if a different presumption were indulged, the statutory remedy would be redundant. If, on the other hand, the two are materially different, the statutory

remedy should also be presumed to be exclusive. Use of the section 1983 remedy would effectively nullify the conditions imposed on the later remedy.

The first several cases to pose the issue since *Thiboutot* have relied on this reasoning. In *Sea Clammers*, the plaintiffs, alleging that discharges and ocean dumping of sewage had unlawfully damaged fishing grounds, claimed a private right of action under the Federal Water Pollution Control Act ("FWPCA"), the Marine Protection, Research, and Sanctuaries Act of 1972 ("MPRSA"), federal common law, and on other grounds. Although none of the parties had invoked section 1983, the Court raised and disposed of it in a single paragraph. The existence of a comprehensive remedial scheme, the Court said, may demonstrate a congressional intent to preclude a cause of action under section 1983. Because the statutes did "provide quite comprehensive enforcement mechanisms," the Court doubted "that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies including the two citizen-suit provisions." The Court so concluded even though broad savings clauses appeared to compel a contrary conclusion.

Lower courts have used similar reasoning in finding the section 1983 action preempted by express private causes of action in the substantive statute at issue. They have also found that implied causes of action preempt section 1983 — an equally persuasive result if the implication of the private right of action is justified.

49 University of Chicago Law Review, 394, 427-428 (1982). The above-quoted language is supported by citations to cases such as *Anderson* v. *Thompson*, 658 F.2d 1205, 1214-1217 (7th Cir. 1981).

Since petitioners do not contend that the EAHCA is enforceable through § 1983, the only question in this case is whether the petitioners will be allowed to evade the lack of an attorneys' fees provision in the EAHCA by resorting to a pleading trick. Petitioners contend that in their complaint they alleged a constitutional claim under § 1983 and a claim under § 504 of the Rehabilitation Act. They contend that under the rationale of *Maher* v. *Gagne*, 448 U.S. 122 (1980), they should be entitled to an award of fees on the basis of these concededly unaddressed claims. The problem is that the so-called constitutional claim is nothing but a simulacrum of the EAHCA, and that claim under § 504 of the Rehabilitation Act is nothing but a spectral avatar of the very same EAHCA claim. Petitioners are simply attempting to do indirectly what they can't do directly. Following the necessary logic of *Middlesex County, supra*, the Court of Appeals in this case put it this way:

> This principle precludes section 1988 fees for the constitutional claims at issue here. The fact that the section 1983 claims alleged here are based upon independent constitutional violations rather than violations of the EAHCA itself is immaterial. The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to Thomas because of his handicap, are factually identical to the EAHCA claims. Indeed, in enacting the EAHCA Congress sought to ensure that handicapped children receive the very "rights" that plaintiffs claimed were constitutional under section 1983. *See* S. Rep. No. 168, 94th Cong., 1st Sess. 6-7, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1425, 1430-31 (legislation said to be designed to enable states to fulfill their constitutional obligations to handicapped children). Thus, the only difference between the statutory and constitutional claims is that the former carries with it a far

more favorable legal standard for the plaintiffs and enabled them to prevail on what would otherwise have been fairly questionable claims. Because Congress, in providing statutory remedies for the same factual complaints, did not authorize attorneys' fees for such actions, we do not believe that section 1988 is a sufficient basis for the granting of attorneys' fees here. Plaintiffs' mere recitation of a section 1983 claim cannot create a right to attorneys' fees in litigation as to which Congress, perhaps recognizing the shortness of school funds, has not seen fit to make a special award. Cf. *Scruggs* v. *Campbell*, 630 F.2d 237 (4th Cir. 1980) (plaintiffs cannot evade EAHCA's exhaustion requirements merely by reciting section 1983 in their complaint). If this were not so, attorneys' fees would become available in almost every case by the mere incantation of section 1983. *See Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Statutory Grounds*, 130 U.Pa.L. Rev. 488, 518 (1981).

This is not to say that the EAHCA in any way limits the substantive scope of a handicapped child's constitutional rights. Should a handicapped child have a constitutional claim that is not provided for by the EAHCA, section 1983, and therefore section 1988 might be available. We hold only that where, as here, the constitutional allegations arise from the same factual underpinnings as the statutory claims, section 1988 does not apply.

*Smith* v. *Cumberland School Committee*, 703 F.2d 4, 8-9 (1st Cir. 1983). In sum petitioners should not be permitted to do indirectly what they can't do directly by alleging a sham constitutional claim.

## II. Petitioners "Constitutional Claims" Were at All Times "Moot."

Respondents note here that the EAHCA was enacted under the spending clause (*Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982)) and that this Court has repeatedly held that statutes enacted under the spending clause are the supreme law of the land in states which participate in such programs. *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 2 (1981). It is thus apparent, that in states which participate in the EAHCA, constitutional claims, not themselves going beyond the explicit terms of the Federal EAHCA, cannot arise. Such claims are not "substantial" or "insubstantial" — they are moot, hypothetical, and unreal. No question *on the merits* turns on their resolution. There is also here a confluence between the concept of "arising under" and the concept of mootness. In *Bell* v. *Hood*, 327 U.S. 678, 685 (1946), this Court stated that a case arises under Federal law when:

> the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction. *Gully* v. *First National Bank*, 299 U.S. 109, 112, 113; *Smith* v. *Kansas City Title Co.*, 255 U.S. 180, 199-200.

In the case at hand nothing, not even jurisdiction (already present under the EAHCA), turns on the resolution of peti-

tioner's constitutional claims.[1] *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909) established that constitutional questions should only be examined as a last resort.

If there is to be a rule that constitutional questions should not be considered except as a last resort, then such a rule should be a consistent one. In some circumstances the *necessity* to determine jurisdiction *forces* courts to make a ruling on whether a question is substantial or insubstantial. Federal courts are under a duty to assume jurisdiction when jurisdiction exists. In the case at hand petitioners are contending that such a determination should also be made solely for the purpose of deciding whether or not an attorney fee should be paid. In *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909) this Court stated: "Where a case in this court can be decided without reference to questions arising under

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[1] As Justice Cardozo stated in *Gully* v. *First Nat. Bank*, 299 U.S. 109, 112 (1936): "How and when a case arises under the Constitution or laws of the United States has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and *an essential one*, of the plaintiff's cause of action. *Starin* v. *New York*, 115 U.S. 248, 257; *First National Bank* v. *Williams*, 252 U.S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid*; *King County* v. *Seattle School District*, 263 U.S. 361, 363, 364. A *genuine* and *present controversy*, not merely a *possible* or *conjectural one*, must exist with reference thereto (*New Orleans* v. *Benjamin*, 153 U.S. 411, 424; *Defiance Water Co.* v. *Defiance*, 191 U.S. 184, 191; *Joy* v. *St. Louis*, 201 U.S. 332; *Denver* v. *New York Trust Co.*, 229 U.S. 123, 133; and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. (*Tennessee* v. *Union & Planters Bank*, 152 U.S. 454, *Louisville & Nashville R. Co.* v. *Mottley*, 211 U.S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25; *Taylor* v. *Anderson*, 234 U.S. 74). Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine* v. *Los Angeles*, 202 U.S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co.*, *supra*." (Emphasis added.)

the Federal Constitution, that course is usually pursued and is not departed from without important reasons." The rule enunciated in *Siler* will be best served by allowing its logic full play. In the absence of a need to determine jurisdiction, constitutional claims, which can have no effect on the outcome of the case, should not be examined at all. When jurisdiction is at issue, consideration of such claims does not present issues of mootness. Something — jurisdiction — hinges on the question of whether the claim is substantial or insubstantial.

A rule forbidding courts, in cases such as the one at bar, from ruling on the "substantiality" of Federal claims, not needed to establish jurisdiction, prevents courts from passing judgment needlessly on some constitutional claims and labeling them insubstantial. It also spares courts the embarrassment of ruling that a claim is bad on the merits (perhaps the result of a Court of Appeals precedent) but still substantial enough to support an award of attorney fees. The alternative would be to hold that parties should be allowed to litigate constitutional claims solely to determine the question of attorney fees. Such a ruling would not only subvert *Siler*, but also the consistent ruling of this court (special cases such as *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326 (1980) notwithstanding) that the issue of costs does not save a case from being moot. *Heitmuller* v. *Stokes*, 256 U.S. 359 (1921); *Ward* v. *Arkansas State Police*, 493 F. Supp. 1315, 1328 (E.D. Ark. 1980), *rev'd on other grounds*, 653 F.2d 346, (8th Cir. 1981); *Cramer* v. *Virginia Commonwealth University*, 486 F. Supp. 187, 192 n.7 (E.D. Va. 1980).

## III. Plaintiff Never Presented a Substantial Constitutional Question.

A reading of the EAHCA will show that it is a compendious grant of substantive and procedural rights. 20 U.S.C. §§ 1401-

1461. If plaintiffs are contending that because they did not get initially what they wanted under the EAHCA, they were denied equal protection, they have failed to state a substantial Federal question. *Snowden* v. *Hughes*, 321 U.S. 1 (1944). As the First Circuit Court of Appeals stated in *Creative Environments, Inc.* v. *Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982):

> *Every* appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, "[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution." *Crocker* v. *Hakes*, 616 F.2d 237, 239 n.2 (5th Cir. 1980) (per curiam). *See also Paul* v. *Davis*, 424 U.S. 693, 700, 96 S.Ct. 1155, 1160, 47 L.Ed. 2d 405 (1976) *quoting Screws* v. *United States*, 325 U.S. 91, 108-09, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495 (1945) ("Violation of local law does not necessarily mean that federal rights have been invaded."); *Snowden* v. *Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1944) ("[N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another."). *Cf. Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed. 2d 271 (1981) (no cause of action stated under section 1983 for claims related to discriminatory administration of state tax system). In short, we

> see nothing in the present case to distinguish it sufficiently from the usual land developer's claim under state law to warrant recognition of a federal constitutional question. CEI may quite possibly have state law claims on the facts alleged. If so, there appear to be adequate state law remedies to vindicate these claims without resort to a federal court.

Although the EAHCA is a Federal Act, this case, and the cases just discussed above, are entirely analogous. Simply because a benefit has been denied under a statute does not result in a violation of due process and equal protection.

Petitioner cannot also be arguing that Rhode Island law excluded emotionally handicapped children from an education. At all relevant times Rhode Island law on the subject was as follows:

> 16-24-1. *Duty of school committee to provide special education.* — In any city or town where there is a child within the age range as designated by the regulations of the state board of regents for education, who is either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented, the school committee of such city or town shall provide such type of special education that will best satisfy the needs of the handicapped child, as recommended and approved by the state board of regents for education in accordance with its regulations.

This case developed from the fact that the state laws also created a program entitled "Services for Emotionally Dis-

turbed Children." Rhode Island General Laws, 40.1-7-1, et seq.[2]

The School Committee made the mistaken decision that this program ("Services For Emotionally Disturbed Children"), rather than the School Committee itself, was responsible for educating Thomas Smith (J.A. 66). When this decision was appealed to the Commissioner of Education, he ruled mistakenly that the School Committee was right (J.A. 77, Opinion dated April 17, 1978). He stated:

> Thus, it is our opinion that, pursuant to the provisions of § 40.1-7, it is the responsibility of MHRH to provide special education and related services for Thomas at Bradley Hospital and that the School Committee is required to contribute to MHRH the "per pupil cost" as its share of the cost of the educational and related services provided to Thomas.

The ultimate decision by the Rhode Island Supreme Court was that the School Committee rather than "Services For Emotionally Disturbed Children" was responsible for the education of

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[2] The portion of law which caused the confusion reads as follows:

> 40.1-7-4. *Definition.* — Whenever used in this chapter, or in any order, rule or regulation made or promulgated pursuant to this chapter, or in the printed forms prepared by the department or the director, unless otherwise expressly stated, or unless the context or subject matter otherwise requires, the term:
>
> 1. "Care and treatment" means medical and psychiatric care, medical attention, nursing and medications as well as food, clothing and maintenance, psychological, social work and recreational services and those educational services furnished to a child other than those regular or special education programs under the jurisdiction of the board of regents for education.

emotionally handicapped children. *Smith* v. *Cumberland School Committee, supra* (J.A. 129). None of this, of course, constitutes a denial of due process or equal protection. *Creative Environments, Inc.* v. *Estabrook, supra.*

## IV. The Commissioner of Education was Acting in a Judicial Capacity in This Matter.

It cannot be disputed that the Commissioner of Education was acting in a judicial capacity in this case (see J.A. 77, Decision dated April 17, 1978 by the State Commissioner of Education). His only contact with the matter was to hear a case appealed to him under the EAHCA. Of course, judicial officers, acting in a judicial capacity, possess absolute judicial immunity. *Slotnick* v. *Garfinkle*, 632 F.2d 163 (1st Cir. 1980). This immunity includes those who, while not strictly judges, are acting in a judicial capacity. *Sellars* v. *Procunier*, 641 F.2d 1295 (9th Cir. 1981).

In *Supreme Court of Va.* v. *Consumers Union*, 446 U.S. 719 (1980), the United States Supreme Court stated that it had not yet decided whether judicial officers are subject to prospective relief. It has, therefore, not had occasion to rule whether attorney fees may be awarded against judges. However, in *Supreme Court of Va.* v. *Consumers Union, supra*, the court did state that if the Virginia Supreme Court had been acting in a purely legislative capacity, which possesses a corresponding immunity, attorney fees would not have been awardable. Since the United States Supreme Court apparently found that the Virginia Supreme Court had acted in an enforcement capacity in the particular case, an award of attorney fees was ultimately granted. *Consumers Union of U.S.* v. *Virginia State Bar*, 688 F.2d 218 (4th Cir. 1982).

Respondents submit that the law is that attorney fees should not be *awardable* against administrative officials acting in a judicial capacity. If such fees were to be *awardable* either against the official or the public agency which employs him, there will be created in the official just such an interest in the cases which are brought before him as is forbidden by the Constitution. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972).

*Ward, supra*, held that due process is violated when a judge has an institutional interest in the fines which he imposes. the case at bar is just the same, except that it would involve a loss of funds rather than a gain. Thus, attorney fees should not be awardable against those acting in a judicial capacity.

Respondents submit that a bizarre situation will be created if attorney fees are awardable in a case of this nature. Surely there are no grounds for holding that hearing officers, acting under the EAHCA are liable for attorney fees, under § 1983 and § 1988, simply because the Federal court holds that such a hearing officer made a wrong decision. That is all that happened in this case (see J.A. 189, Order of June 3, 1981). If fees are available under these circumstances, then district court judges and judges of the courts of appeal could, under the rationale of *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) be held liable for attorney fees when they are reversed.

### *An Action Under § 1983 was Not Available in This Case.*

When both the State and Federal government agree, under the spending clause, to jointly create substantive rights and concomitant procedural protections, the rationale of *Monroe* v. *Pape*, 365 U.S. 167 (1961) ceases, if respectfully submitted, to be applicable. In *Monroe*, this court held that a cause of action arose under § 1983 in spite of the fact that state law and

adequate state procedure were also available to vindicate the same right which was the subject of the Federal action. In the case at bar, however, the State and Federal government have joined together, under the spending clause, to create substantive and procedural rights. In *Ingraham* v. *Wright*, 430 U.S. 651 (1977) this Court held that ". . . common-law safeguards that already exist" can provide adequate protection for a constitutional right, and that no procedural due process claim could, therefore, arise under the constitution, to be vindicated under § 1983. It is submitted that the procedural due process rights granted under the EAHCA are more than sufficient to vindicate whatever constitutionally protected rights are present in a case of this nature. This court should hold that the procedural rights under the EAHCA, have the same effect as the common-law had in *Ingraham*, *supra*, and that a constitutional cause of action, therefore, did not arise.

## V. Petitioners Prevailed in an Action to Enforce the EAHCA Not in an Action under § 1983.

In any event the enabling act of the Federal Rules of Civil Procedure makes it plain that no power is granted to abridge substantive rules of law. 28 U.S.C. § 2072. While the rules may establish "one form of action" it is submitted that in order to be entitled to attorney fees under § 1988 which applies in "any action or proceeding to enforce . . ." a claim for which § 1983 creates a remedy ("shall be liable . . . in an *action at law*, suit in equity, or other proper proceeding . . .") one must prevail either in an action to enforce § 1983 or a claim pendent to an action to enforce § 1983. Here petitioners' § 1983 action is surplus to petitioners' EAHCA action, under 20 U.S.C. § 1415. If petitioners prevailed at all, they prevailed in an action to enforce the EAHCA. They did not prevail in an action to enforce § 1983 or in a claim pendent to a § 1983 action.

A reading of *Aldinger* v. *Howard*, 427 U.S. 1 (1976) will show that there is a distinction between a *cause of action* under § 1983 and the general civil action (the "one constitutional 'case'" defined in *Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966)) over which the District Court presides. A valid distinction exists here.[3] *Davis* v. *Passman*, 442 U.S. 228, at 236 (1979).

## VI. In this Case, Fees are Not Available under the Rehabilitation Act.

Fees are not available under the Rehabilitation Act here for substantially the same reasons that they are not available under § 1983 and § 1988. *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983). In addition, this court has held that § 504 of the Rehabilitation Act does not require recipients to make substantial modifications in programs. *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979). Private school placement (the issue in this case) is the sort of affirmative action that is not required under the Rehabilitation Act. *Colin K. By John K.* v. *Schmidt*, 715 F.2d 1 (1st Cir. 1983). Plaintiffs, therefore, failed to state a claim under § 504 at all.

It should also be noted that this court has reserved the question of whether a private right of action exists under § 504. *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983). In *Maher* v. *Gagne*, *supra*, this court also reserved the ques-

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[3] The general reasoning of *Aldinger* survived *Monell* v. *New York City Depart. of Social Services*, 436 U.S. 658 at 701 n.66. *Aldinger*, of course, is not cited here for any reason to or with "pendent parties" but only to show that § 1983 actions are distinct "causes of action" which are separate from "the form of action" described in Fed.R.Civ.P. 2.

tion of whether claims not falling under the rubric of the Fourteenth Amendment can ever suffice to breach a state's Eleventh Amendment immunity and thus provide a basis for an award of attorney fees. *Maher* v. *Gagne*, *supra* at 130. Although there is dicta to the effect that fees are part of costs, and thus not subject to Eleventh Amendment immunity, a reading of the applicable cases (*i.e.*, *Hutto* v. *Finney*, 437 U.S. 678 (1978)) will show that this issue has not yet been decided.

Respondents submit that if the court should reach these questions that a private right of action, given the availability of administrative relief, should not be implied under § 504. Even if an implied remedy exists, respondents urge that the Eleventh Amendment bans an award of attorney fees in claims not arising from the Fourteenth Amendment since attorney fees are not properly "costs" of an action.

Respondents also submit that such issues should not be considered here at all. The fact that such issues are sought to be raised here demonstrates the inherent vice of the petitioner's contention that this Court, or any court, should consider such moot issues for the sole purpose of determining the availability of attorney fees. If this Court is to rule on the existence of a private cause of action under § 504, it should do so in a case where the resolution of the question goes to the merits of the case rather than to the availability of attorney fees. To do so would simply constitute an abuse of the discretion available under § 505(h) of the Rehabilitation Act.

## Conclusion.

Petitioners are not entitled to an award of attorney fees in the case at bar.

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No. 82-2120

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS F. SMITH, JR., et al.,

*Petitioners,*

—v.—

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,

*Respondents.*

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## STATEMENT

Nowhere in their Brief for Respondents do respondents directly address the questions presented to this Court in this proceeding. Respondents instead list six arguments which have no relevance here. Overall, respondents also attempt to minimize the importance of petitioners' constitutional claims on the merits.

In this Reply Brief for Petitioners, we initially reply seriatim to the six arguments raised by respondents. Thereafter, we correct respondents' distortions of the merits proceeding in this case by reiterating the crucial role that petitioners' constitutional claims played throughout this litigation on the merits in preventing the total denial of education services to petitioner Tommy Smith. Because petitioners, within this constitutional context, ultimately prevailed primarily as a result of certified state law

questions decided by the Rhode Island Supreme Court, we also explain that this Court's recent decision in Pennhurst State School & Hospital v. Halderman, 104 S.Ct. 900 (1984) ("Pennhurst II"), has no applicability here since this case on the merits never involved either a pendent state claim or a federal court order requiring compliance by state officials with state law.

## ARGUMENT

### I. The Specific Arguments Raised in the Brief for Respondents Are Entirely Without Merit

The six arguments raised in the Brief for Respondents warrant no more than a cursory reply.

1. Petitioners have not claimed here that the Education for All Handicapped Children Act [the "EAHCA"] is a "law" enforceable through 42 U.S.C. § 1983. See Brief for Petitioners at 55-56 & n.23.

Petitioners accordingly have not "conceded" that the EAHCA is not enforceable through § 1983. Brief for Respondents at 3. Instead, this simply is an issue not presented to this Court. Cert. Pet. at 13-14 n.3, 19 n.6.

2. Petitioners' constitutional claims on the merits were hardly "moot, hypothetical [or] unreal." See Brief for Respondents at 7. Quite to the contrary, petitioners' due process claim afforded them temporary and preliminary injunctive relief not only against the local school committee defendants, J.A. 27-29, 30-31, 32-48, but against respondents as well, J.A. 127-28. Additionally, the strength and viability of petitioners' equal protection claim was demonstrated by the district court's uncontested and unappealed finding that the claim was substantial, A. 42-43, and is further apparent from this Court's equal protection decisions and from the many lower court cases in which

such a claim has prevailed as a matter of law, see Brief for Petitioners at 41-42 n.18.

3. For the reasons just stated, see also infra at 9-11, there is no question that petitioners' constitutional claims were in fact substantial.

4. Contrary to respondents' next assertion, the Commissioner of Education (respondent Pontarelli) enjoyed no immunity on the merits proceeding in this case for actions which respondents allege were taken in a quasi-judicial capacity. See Brief for Respondents at 13-14. As the district court correctly ruled in denying respondents' motion to dismiss the merits on this ground, J.A. 179-81, judicial immunity immunizes judicial actors from damages but not from declaratory or injunctive relief such as was sought in this lawsuit, and, in any event, respondent Pontarelli and his predecessor in office were sued here in their enforcement

capacities in which they may be properly held liable, see Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980). Additionally, since the district court's ruling on the merits of this issue was affirmed by the First Circuit on respondents' appeal, J.A. 6,[1] and since respondents never sought further review of this issue, it is not now open to review under the doctrines of res judicata, law of the case, and finality of judgments. This issue, which was finally resolved on the merits, certainly may not now be reconsidered in this collateral proceeding on fees. See White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Boeing Co. v. Van Gemert, 444 U.S. 472, 479 n.5 (1980).

1. See the one-page, unreported decision by the First Circuit in Smith v. Cumberland School Committee, Nos. 81-1454 and 81-1499 (1st Cir. Jan. 11, 1982), a decision which was filed in the district court on January 12, 1982, and which is a part of the record in this case.

5. Despite respondents' bald assertion in their Brief for Respondents at 15-16 that petitioners prevailed on the merits only in an action to enforce the EAHCA (which was not even effective when this action was commenced), there simply is no question on this record that petitioners prevailed in an action in which they asserted substantial constitutional claims through § 1983 and that they accordingly prevailed in "any action or proceeding to enforce a provision of" § 1983. 42 U.S.C. § 1988. Similarly, since petitioners prevailed in an action in which they asserted a substantial claim of exclusion from education in violation of § 504 of the Rehabilitation Act, they accordingly prevailed in "any action or proceeding to enforce or charge a violation of" § 504 within the meaning of § 505(b) of the Rehabilitation Act as amended in 1978, 29 U.S.C. § 794a(b). Congress' intent, much

less its express language, cannot be so blithely ignored. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("we are obliged to give effect, if possible, to every word Congress used").

6. Respondents' final set of contentions in their Brief for Respondents at 16-17, pertaining to the alleged unavailability of fees under § 505(b) of the Rehabilitation Act, is also wide of the mark. First, petitioners' § 504 claim was an exclusion claim, not at all a claim having anything to do with requesting substantial modifications in existing programs. See Brief for Petitioners at 27-29, 58-74. Second, there is no longer any legal question about the existence of an express statutory private right of action to enforce § 504. See Consolidated Rail Corp. v. Darrone, 52 U.S.L.W. 4301 (U.S. Feb. 28, 1984); see also Brief for Petitioners at 71-72 n.31. Finally, there is no eleventh

amendment immunity from an award of fees under § 505(b) not only because Congress incorporated into § 505(b) the legislative history of the 1976 Fees Act, see Brief for Petitioners at 61-62 & n.26, but also because Congress explicitly enacted § 505(b) pursuant to its power under § 5 of the fourteenth amendment and expressly dictated that "the 11th amendment is no bar to the recovery of attorney's fees under the proposed section 505(b)," 124 Cong. Rec. 30347 (1978) (remarks of the fee provision's author, Senator Cranston); id. at 37508 (remarks of Senator Stafford, the ranking member of the Subcommittee on the Handicapped). See generally Hutto v. Finney, 437 U.S. 678 (1978).

Respondents' arguments are entirely without merit.

## II. Petitioners Prevailed Throughout the Merits Proceeding on Their Due Process Claim, and They Ultimately Prevailed on the Merits Primarily as a Result of Certified State Law Questions Answered by the Rhode Island Supreme Court

Respondents assert throughout their Brief for Respondents that petitioners' constitutional claims were, in respondents' view, essentially meaningless; and they appear to argue that petitioners' rights were in any event guaranteed by state law throughout this litigation. These distortions are belied by the record in this case.

1. In support of their view that petitioners "resort[ed] to a pleading trick" by alleging what respondents refer to as "a sham constitutional claim," Brief for Respondents at 5-6, respondents quote at length from the Rhode Island statute which respondents now concede guaranteed an education to petitioner Tommy Smith and all other emotionally handicapped children at "all relevant times" in

this litigation, id. at 11. Respondents, however, fail to point out that respondents refused to enforce this statute, that they instead fully supported the local school committee's refusal to comply with this statute, and that their actions would have in fact totally excluded petitioner Tommy Smith from receiving an education had petitioners not commenced this litigation. See Brief for Petitioners at 4-18. What respondents also fail to point out is that petitioners succeeded on their due process claim not only in preventing the total denial of an education to Tommy without any prior notice or hearing whatsoever, but also in securing an education for Tommy throughout the lengthy litigation proceedings on the merits of this case. Id.; see also supra at 3-4. Far from being a sham, petitioners' constitutional claims provided them with success throughout the pendency of this litigation and provided

the foundation for their ultimate success.

2. Ultimately, petitioners did prevail primarily as a matter of state law subsequent to the Rhode Island Supreme Court's decision, J.A. 129-51, on two state law questions certified to it by the federal district court, J.A. 108-26. Contrary to the implications in their Brief for Respondents at 5-6, respondents prior to being sued in this lawsuit refused to enforce state law, see Brief for Petitioners at 4-18; see also supra at 9-10, a fact which brought about this litigation, id. Additionally, both the federal court's certification order, J.A. 108-26, and the Rhode Island Supreme Court's decision on certification, J.A. 129-51, recognized the crucial role provided by petitioners' constitutional and federal statutory claims.

Because of the fact that petitioners nonetheless ultimately prevailed under state

law, there is possibly a superficial resemblance between the resolution of this case on the merits and this Court's decision in Pennhurst v. State School & Hospital v. Halderman, 104 S.Ct. 900 (1984) ("Pennhurst II"). In Pennhurst II, a case in which plaintiffs had alleged a pendent state claim in federal court, this Court held that the federal court was barred by the eleventh amendment from interpreting state law and ordering defendant state officials to comply with state law. On the facts relevant to the merits proceeding here, Pennhurst II is inapposite.2/

2. Even if the merits proceeding in this case had been factually and chronologically similar to that in Pennhurst II (i.e., a pleading with a pendent state law claim, a resolution of the state law issue by the federal court, and a federal court order on the merits requiring state compliance), even then the merits proceeding could not now be reconsidered in this collateral proceeding on fees. White v. New Hampshire Department of Employment Security, 455 U.S. 445 (1982); Boeing Co. v. Van Gemert, 444 U.S. 472, 479 n.5 (1980).

[footnote con't on next page]

Petitioners on the merits have never

In any event, even if the long-ago-resolved merits could be reopened and reconsidered in this collateral proceeding, Pennhurst II still would have no effect here since it could not be applied retroactively under the three considerations set forth in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971), and applied definitively to this Court's decision on Art. III jurisdiction in Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87-88 (1982). As in Northern Pipeline, id. the relevant "considerations militate against the retroactive application" of Pennhurst II.

Initially, the Court in Pennhurst II decided an issue of first impression whose resolution was not clearly foreshadowed by earlier cases. This conclusion is compelled by a comparison of Justice Powell's majority opinion, 52 U.S.L.W. at 4155-65, with Justice Stevens' dissenting opinion, 52 U.S.L.W. at 4165-76. See also, e.g., such pendent claim cases as Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909); and such pendent claim and eleventh amendment cases as Greene v. Louisville & Interurban R. Co., 244 U.S. 499 (1917); and Rolston v. Missouri Fund Commissioners, 120 U.S. 390 (1887).

Additionally, retroactive application of Pennhurst II would not further the operation of its holding but would instead, as is well illustrated by this case, produce substantial inequitable results in individual cases since retroactive application would play havoc with such established legal doctrines as res judicata, law of the case, and finality; it would require relitigation of hundreds of lawsuits which had been finally resolved on the merits; and it would require an

alleged a pendent state claim in their initial Complaint, J.A. 8-14; in their First Amended Complaint, J.A. 49-64; or in their concluding Second Amended and Supplemental Complaint, J.A. 152-168. No pendent state law claim, in other words, was ever involved here.

Nevertheless, because respondents' erroneous interpretation of and refusal to enforce state law had caused the federal constitutional and federal statutory violations complained about by petitioners, id., see also Brief for Petitioners at 7-8, and because the federal district court believed that respondents may have been wrong as a matter of state law, J.A. 108-23, the

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unprecedented waste of scarce judicial resources. Similar and even lesser inequities bar retroactivity. See, e.g., Northern Pipeline; Chevron Oil; Cipriano v. Houma, 395 U.S. 701 (1969); Allen v. State Board of Elections, 393 U.S. 544 (1969); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).

federal court "in the interest of comity and in order to avoid unnecessary adjudication of constitutional and federal claims" certified two state law questions to the Rhode Island Supreme Court for decision, J.A. 124-26;[3] cf. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). The Rhode Island Supreme Court, in response to certification, answered both questions in favor of petitioners. J.A. 129-51.

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3. Rule 6 of the Rules of the Supreme Court of Rhode Island provides in relevant part:

> This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or of the District of Columbia, or a United States District Court when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in decisions of this court.

The federal district court at this point did not excercise any federal judicial power based on its prior constitutional decision, on its view of the federal statutory claims, or even on state law. Instead the federal district court, after receiving the decision rendered by the Rhode Island Supreme Court and after ascertaining the local school committee's agreement to comply with that decision, J.A. 172-76, simply found as an ultimate finding of fact that petitioners had prevailed by obtaining the objective sought in their lawsuit. J.A. 189-94. Without ever interpreting state law and without ever issuing injunctive relief requiring respondents' compliance with state law, the district court concluded its final order on the merits by stating:

> It having been established that [petitioner] Thomas Smith III was, and is, entitled to be educated at the cost of the Cumberland School Committee as a matter of state law, [petitioners] have

> obtained the object of their suit and it is both unnecessary and improper for this Court to go further and reach their federal statutory and constitutional claims.
>
> The entry of this order resolves all issues in this case with the exception of the question of attorney's fees. [Petitioners] are hereby given fourteen days to move for an award of fees.

J.A. 193.[4]

This case, in sum, involved no federal court order requiring state officials to comply with state law, no federal court interpretation of state law, and in fact no pendent state law claims. Instead, on the uncontested and uncontrovertable facts in this case, petitioners alleged substantial federal constitutional and federal statutory

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4. The First Circuit, in affirming the district court's final resolution on the merits and in rejecting respondents' appeal from the merits, similarly concluded that petitioners had "won, as a matter of state law, all that [they] originally sought," and that the litigation on the merits was accordingly "moot." J.A. 6; see also supra at 5 and note 1.

claims; petitioners prevailed initially and throughout this litigation on the merits on their due process claim; and petitioners thereafter prevailed primarily as a result of the Rhode Island Supreme Court's certified interpretation of a state law which respondents had refused to enforce.

## CONCLUSION

For the reasons stated herein and in our opening Brief for Petitioners, petitioners should be held entitled to fees and the judgment of the First Circuit accordingly should be reversed.

Dated: March 21, 1984

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IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THOMAS F. SMITH, JR., et al.,
*Petitioners*

*v.*

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,
*Respondents*

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF OF *AMICI CURIAE*

THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, THE NATIONAL MENTAL HEALTH ASSOCIATION, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE AMERICAN COUNCIL OF THE BLIND, THE AFFILIATED LEADERSHIP LEAGUE OF AND FOR THE BLIND, THE NATIONAL ASSOCIATION OF THE DEAF, THE INTERNATIONAL ASSOCIATION OF PARENTS OF THE DEAF, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE DISABILITIES RIGHTS EDUCATION DEFENSE FUND, THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, THE PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, THE PENNSYLVANIA ASSOCIATION FOR CHILDREN WITH LEARNING DISABILITIES, ADVOCACY, INC., UNITED CEREBRAL PALSY OF NEW YORK CITY, INC., AND STATEWIDE YOUTH ADVOCACY, INC.
IN SUPPORT OF REVERSAL

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## INTEREST OF *AMICI CURIAE*

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] *amici* file this brief in support of petitioners Thomas, Ursula and Tommy Smith.

*Amici* are 15 non-profit organizations concerned with the welfare of handicapped individuals.[2] As such, *amici* count among their members the parents of thousands of handicapped children who depend on the pub-

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1. Letters of consent to the filing of this brief are being lodged with the Clerk of the Court.

2. *Amici* include:

(1) The Association for Retarded Citizens of the United States, a voluntary organization of 300,000 members devoted to promoting the welfare of mentally retarded children and adults;

(2) The National Mental Health Association, a citizens' organization of one million lay and professional members whose primary purpose is to encourage efforts to provide better educational and other services for mentally ill children and adults;

(3) The American Orthopsychiatric Association, founded in 1924. AOA is a professional educational organization of more than 10,000 psychologists, psychiatrists, nurses, social workers, educators and other individuals who serve mentally ill and mentally retarded persons;

(4) The American Council of the Blind, the nation's largest non-profit membership organization of blind and visually impaired individuals. ACB seeks to ensure that blind people, including blind school-aged youngsters, have the opportunity to participate fully in all aspects of American life;

(5) The Affiliated Leadership League of and for the Blind of America, a non-profit organization consisting of eighty national, state and local organizations of and for blind people, including almost all of the national organizations of and for blind people. The ALLB is dedicated to advancing the rights of and obtaining services for blind people;

(6) The National Association of the Deaf, a national non-profit organization of approximately 18,000 members who are hearing-impaired adults, parents of hearing-impaired children, and professionals who serve deaf individuals. The NAD is the largest consumer organization of hearing impaired people in the United States;

(7) The International Association of Parents of the Deaf, an international organization composed primarily of parents of deaf individuals. The purpose of IAPD is to provide information

lic education system for their schooling. The issue presented herein — the availability of attorney's fees to parents who prevail in cases seeking special education for their handicapped children — is therefore of acute practical concern to *amici*.

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NOTE — *(Continued)*

and support to families with children who are deaf or hard of hearing;

(8) The American Coalition of Citizens with Disabilities, a national association composed of national, state and local organizations of and for disabled persons. ACCD represents some eight million disabled individuals, parents of disabled persons, and service providers, and is the only national coalition of disability groups of all types;

(9) The Disability Rights Education and Defense Fund, a non-profit corporation founded in 1979 by disabled adults and parents of disabled children. DREDF addresses issues of disability rights from the perspective that all disabled people are entitled to live full and integrated lives;

(10) The Developmental Disabilities Advocacy Network of Pennsylvania, an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System. DDAN is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled children and adults;

(11) The Pennsylvania Association for Retarded Citizens, an organization of approximately 14,000 persons most of whom are parents of retarded individuals. PARC has long been concerned with the educational services available to retarded children and brought the landmark case concerning the right of such children to attend public school, *PARC v. Pennsylvania*, 334 F.Supp. 1257 (E.D.Pa. 1971), 343 F.Supp. 279 (E.D.Pa. 1972);

(12) The Pennsylvania Association for Children With Learning Disabilities, founded in 1967, an organization of approximately 800 persons most of whom are parents of learning-disabled children. PACLD assists parents in understanding their children's rights to special education services and obtaining the services to which they are entitled;

(13) Advocacy, Inc., an independent, non-profit organization which serves as the Protection and Advocacy agency for the State of Texas. As such, Advocacy, Inc. provides direct services to developmentally disabled children and adults throughout Texas;

Parents of handicapped youngsters labor under financial burdens unfamiliar to those who have nondisabled children. Expenditures for special medical procedures, therapies, psychological treatment and the like are the norm rather than the exception. Such expenditures typically leave little or no funds with which to retain a lawyer. Yet, as this case shows, legal representation is sometimes necessary in order to secure the handicapped child's basic educational entitlements.

When a legal battle occurs, parents may — as in this case — find themselves opposed by an impressive array of legal talent representing local school authorities as well as state education officials. Parents cannot take on such adversaries, even if their child's future is at stake, without the assistance of an attorney; parents who cannot afford to hire an attorney therefore generally cannot assert their child's rights. Agencies such as *amici*, moreover, can provide legal representation in only a small percentage of cases.

The consequence of an affirmance herein, therefore, will be that violations of the rights of handicapped children will go without redress. This might give little cause for concern if the controversies at issue involved only esoteric disputes over educational methodology; such, however, is not the case.[3] As Tommy Smith's case

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(14) United Cerebral Palsy of New York City, Inc., a nonprofit corporation formed to advance the interests of cerebral palsied individuals in New York. UCP provides direct services to children and adults and conducts public and professional education and advocacy programs;

(15) Statewide Youth Advocacy, Inc., a not-for-profit corporation, located in Rochester, N.Y., and organized in 1976 for the purpose of securing the rights of children and youth to quality public services in the area of child welfare, juvenile justice, and public education.

3. Indeed, such disputes often will not raise legally cognizable claims. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

demonstrates, these lawsuits — while relatively rare[4] — often involve the fundamental problem of discriminatory exclusion from education opportunity. Congress has clearly provided that in such cases, as in other litigation to secure civil and constitutional rights, a prevailing plaintiff shall recover attorney's fees. For these reasons, *amici* have sought this opportunity to be heard and to urge reversal of the decision below.

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4. The total number of such lawsuits is relatively small. In 1980, for example, fewer than .007% of children (256 children nationwide) in publicly funded special education programs filed a complaint in either state or federal court relating to any aspect of their special education. National Center for State Courts, *Student Litigation: A Compilation and Analysis of Civil Cases Involving Students, 1977-1981*, 22 (1981).

## STATEMENT OF THE CASE

*Amici* adopt petitioners' Statement of the Case, with the following additional observations.

This litigation arose when Rhode Island education authorities — *i.e.*, respondents and a local school board — disagreed with the Rhode Island Department of Mental Health, Retardation and Hospitals (MHRH) over the question of which of them was responsible for the education of Tommy Smith, an eight-year-old handicapped child. Because Tommy was emotionally disturbed, respondents took the position that MHRH should educate him; MHRH, which had no services available for Tommy and in any event would not have provided services free of charge to Tommy's parents, contended that Tommy was respondents' responsibility.

The agencies did not, however, resolve their disagreement through inter-agency negotiation or by seeking a declaratory judgment in a state court. Instead, in an "outpouring of bureaucratic compassion," *cf. Rabinowitz v. New Jersey State Board of Education*, 550 F.Supp. 481, 482 (D.N.J. 1982), they both simply declined to serve Tommy, thus shifting to Tommy's parents the burden of obtaining a judicial resolution of the inter-agency dispute. That task required more than five years of federal litigation.

At no time did this litigation involve any question over whether Tommy needed special education services, or whether he was entitled to receive such services from the State. There was likewise no dispute over the content of the program that Tommy should receive or the facility in which that program should be delivered. Thus, the issues presented in *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), never arose here.

Since this lawsuit was needed not in order to make any determination about Tommy, but rather to sort out the respective duties of various Rhode Island State agen-

cies, it is ironic that the task of prosecuting the case fell upon Tommy's parents. Nevertheless, because their son would otherwise have received no education, petitioners had no choice but to litigate the matter in the District Court, the Supreme Court of Rhode Island, and the Court of Appeals for the Fifth Circuit. The substantial attorney's fees that the Smiths incurred during this extended odyssey are the subject of the present proceeding.

## SUMMARY OF ARGUMENT

Petitioners are entitled to a fee award under each of two statutes: §505 of the Rehabilitation Act of 1973, 29 U.S.C.A. 794a(b) ("§505"), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C.A. 1988 ("§1988").

Fees are available under §505 because petitioners raised a substantial claim under §504 of the Rehabilitation Act, 29 U.S.C.A. 794 ("§504"), *i.e.*, that respondents had discriminated against Tommy on the basis of his handicap; and because petitioners obtained all of the relief that they sought. §505, which expressly authorizes a fee award under such circumstances, contains no exception for cases in which plaintiffs' claim might also have been raised under the Education for All Handicapped Children Act, 20 U.S.C.A. 1401 *et seq.* ("EAHCA"). Moreover, the EAHCA did not expressly or by implication limit or preclude petitioners' §504 claim.

Fees should be awarded under §1988 because petitioners raised substantial Due Process and Equal Protection Claims and obtained all of the relief that they sought. Section 1988 contains no exception for cases in which constitutional claims are ultimately avoided in favor of a decision on statutory grounds; on the contrary, settled precedent dictates that fees be awarded in such cases.

## ARGUMENT

### I. PETITIONERS ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER §505 OF THE REHABILITATION ACT OF 1973

#### A. *Petitioners Prevailed in a Case Raising Substantial Claims Under §504 of the Rehabilitation Act and are Therefore Entitled to Attorney's Fees Under §505 of That Act*

As a basis for an award of fees in this case, petitioners invoked §505 of the Rehabilitation Act of 1973, 29 U.S.C.A. 794a ("§505"). That statute expressly authorizes fee awards to prevailing parties in cases raising claims under §504 of the Rehabilitation Act, 29 U.S.C.A. 794 ("§504").

The Court of Appeals did not dispute petitioners' assertion that they had raised §504 claims or that they had "prevailed" within the meaning of §505.[5] Rather, the court held that another statute — the Education for All Handicapped Children Act (EAHCA)[6] — prohibits such awards in cases that also fall within the scope of that statute, even if all of the requirements of §505 are met.

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5. The Court of Appeals questioned whether a private cause of action exists under §504, but did not rest its holding on this ground. *Smith v. Cumberland School Committee*, 703 F. 2d 4, 9 (1st Cir. 1983). Every other Court of Appeals to consider the issue has found such a cause of action. *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1983), *cert. denied*, 103 S.Ct. 215 (1982) (collecting cases). Moreover, this Court has held that a private right of action exists to enforce Title VI of the Civil Rights Act of 1964, *Guardians Ass'n v. Civil Service Commission*, 103 S.Ct. 3221 (1983), after which §504 was patterned, *Community Television of Southern California v. Gottfried*, 103 S.Ct. 885, 892 (1983). *Cf. Cannon v. University of Chicago*, 441 U.S. 677 (1979) (private right of action under comparable language of Title IX of Education Amendments of 1972). The question of the existence of a private cause of action under §504 is presently before this Court in *Le Strange v. Consolidated Rail Corp.*, 687 F.2d 767 (3d Cir. 1982), *cert. granted sub nom. Consolidated Rail Corp. v. Darrone*, 103 S.Ct. 1181, 1765 (1983) (No. 82-862).

6. 20 U.S.C. §1401 *et seq.*

In so holding, the court imported into §505 an exception that appears nowhere in the language or legislative history of §505, and accomplished the illogical result of permitting a statute enacted in 1975 partially to repeal by implication one enacted three years *later*.

Section 504 provides in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in §706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

Section 505(b), the attorney's fees statute associated with §504, provides:

> In any action or proceeding to enforce or charge a violation of a provision of this title [including §504], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The language of §505 is virtually identical to that of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. §1988, and is therefore to be given a like construction. *Northcross v. Board of Education*, 412 U.S. 427(1973); *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1939, n.7 (1983).[7] Accordingly, as under §1988, a party "prevails" within the meaning of §505 by raising a substantial §504 claim and by achieving at least some of the benefit sought through the litigation, *Hensley v.*

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7. The legislative history further confirms Congress' intent that the statutes be similarly construed. *See* 124 Cong. Rec. 30346 (remarks of Senator Cranston, author of the provision, emphasizing intent "that interpretation of the attorney's fee provision . . . be analogous to interpretations of the Civil Rights Attorney's Fees Act of 1976"); 37508 (Senator Stafford) (1978).

*Eckerhart*, *supra*, 103 S.Ct. at 1939. It is immaterial whether such benefit is obtained by way of an actual determination of the §504 claim, a settlement, or (as here) a favorable determination on another, non-fee claim. Moreover, where relief is obtained by way of settlement or on another legal ground, the court need not determine whether the plaintiff would have won on the merits of the §504 claim had the matter proceeded to decision. *Maher v. Gagne*, 448 U.S. 122 (1980); *United Handicapped Federation v. Andre*, 622 F.2d 342 (8th Cir. 1980); *Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881 (4th Cir. 1982).[8] Finally, where a plaintiff has "prevailed" by any of the above routes, fees should ordinarily be awarded. *Hensley v. Eckerhart*, *supra*, 103 S.Ct. at 1937.

There is no question that petitioners herein raised substantial claims under §504. In their Complaint, petitioners charged that that statute was violated by respondents' proposal to terminate the funding for Tommy's educational program. Moreover, that action was to be taken precisely because of Tommy's handicap. As respondents acknowledged, it was Tommy's emotional disturbance that led them to decide that they would no longer take responsibility for his education. Respondents proposed that Tommy instead be served by the public mental health system, which had a lengthy waiting list for services and would have charged Tommy's parents a fee for any services provided. By contrast, respondents

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8. *See also* comparable decisions under the attorney's fee provision of Title VII of the Civil Rights Act of 1974, 42 U.S.C. §2000e-5(k), which make clear that the policy of avoiding unnecessary determinations on the merits extends to statutory as well as constitutional claims. *Young v. Kenley*, 641 F.2d 192 (4th Cir. 1981), *cert. denied sub nom. Long v. Bonnes*, 455 U.S. 961 (1982). A contrary rule would create a substantial disincentive to settlement, since there would be no possibility of avoiding an eventual decision on the underlying claims; moreover, the court would be burdened with a full trial on the merits in the context of a collateral motion.

provided a free education to all non-handicapped children and to all children with handicaps other than emotional disturbance.[9]

Tommy's situation was thus precisely that proscribed by §504: he was to be "excluded from the participation in, . . . denied the benefits of, [and] subjected to discrimination" within a federally-assisted program as a result of his handicap. The courts have had no difficulty finding a §504 violation in cases of total, or even partial, exclusion from free educational services. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3435 (Dec. 5, 1983) (No. 83-558); *New Mexico Association for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982); *New York State Association for Retarded Citizens v. Carey*, 612 F.2d 644 (2d Cir. 1979); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D.W.Va. 1976).[10]

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9. Second Amended and Supplemental Complaint at 8.

10. Indeed, while the issue is not presented in this case, the courts have found §504 violations not only where a child was partially or totally excluded from services, but also where the services provided were inappropriate — *i.e.*, not suited to the child's particular needs. 34 C.F.R. Part 104, Subpart D; *New Mexico Ass'n for Retarded Citizens v. New Mexico, supra; Georgia Ass'n for Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981); *Jose P. v. Ambach*, 557 F. Supp. 1230 (E.D.N.Y. 1983); *Sanders v. Marquette Public Schools*, 561 F.Supp. 1361 (W.D.Mich. 1983); *contra, Timms v. Metropolitan School Dist.*, 718 F.2d 212 (7th Cir. 1983). Such holdings are consistent with this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In *Davis*, the Court held that respondent was not a "qualified" handicapped person within the meaning of §504. By contrast, Tommy Smith and all other children of school age are "qualified" to receive an education. 34 C.F.R. §104.3(k) (2); *New Mexico Ass'n, supra; Jose P., supra*, 557 F. Supp. at 1235-36. Moreover, the education provided must be meaningful in light of the handicapped child's needs if discrimination is to be avoided, *cf. Lau v. Nichols*, 414 U.S. 563 (1974). The Court need not reach this issue, however, since petitioners' claim was that Tommy was totally excluded from respondents' program. *See Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1356, n. 13 (5th Cir. 1983).

There is also no doubt that petitioners obtained precisely the relief that they sought under §504, *i.e.*, an order compelling respondents to educate Tommy. To be sure, that order was premised primarily on state law, the District Court finding it unnecessary to reach the merits of petitioners' federal claims. The Court of Appeals acknowledged, however, that this fact did not defeat petitioners' entitlement to fees under §505: "[A]ttorney's fees are available under [§505] whenever a party presents a substantial §504 claim even if they do not ultimately prevail under that claim," 703 F.2d at 9.

Nevertheless, attorney's fees under §505 were denied. The difficulty was that this action not only raised §504 claims but also "[fell] within the parameters of" another statute — the EAHCA. 703 F.2d at 7. Under these circumstances, the court held, "the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act." 703 F.2d at 10. In the court's view, because the EAHCA did not expressly authorize fee awards, such awards were also barred under §505 with respect to §504 claims that *might have been* decided under the EAHCA.

The court's conclusion contravenes the express language of §505, which contains no exception for §504 cases that also implicate other statutes. On the contrary, §505 authorizes a fee award to the prevailing party in "any" action or proceeding to enforce §504. This Court has made clear the result that must be reached under these circumstances. "Absent a clearly expressed legislative intention to the contrary, [the] language [of a statute] must ordinarily be regarded as conclusive." *North Dakota v. United States*, 103 S.Ct. 1095 (1983).

The legislative history of §505 lends no support to the construction adopted by the Court of Appeals. Section 505 was enacted in 1978,[11] several years after pas-

11. P.L. 95-602, Title I, §119.

sage of §504 and the EAHCA. By that date, cases involving the education of handicapped children had been decided under both statutes[12] and the Department of Education was administratively enforcing both acts.[13] Congress was therefore necessarily aware, when it enacted §505, that one result of that act would be to allow attorney's fees in certain cases that also fell within the scope of the EAHCA. Nevertheless, Congress made no exception for such cases, nor was any such exception ever discussed. The rule to be applied in these circumstances is clear:

> We have emphasized in the recent past that "[o]ur individual appraisal of the wisdom or unwisdom of a particular [legislative] course . . . is to be put aside in the process of interpreting a statute." *TVA v. Hill*, 437 U.S., at 194, 98 S.Ct., at 2302 (1978). Our task, rather, is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted.

*Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980).

The Court of Appeals' conclusion that §505 incorporates an exception for claims that also fall within the EAHCA is in effect a holding that the EAHCA repealed §505 by implication with respect to cases presenting such claims. Such is logically impossible, since §505 was enacted three years *after* the EAHCA.[14] It is un-

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12. *E.g., Hairston v. Drosick, supra*; *New York State Ass'n for Retarded Children v. Carey*, 466 F.Supp. 479, 466 F. Supp. 487 (E.D.N.Y. 1978), *aff'd*, 612 F.2d 644 (2d Cir. 1979); *Brown v. Dist. of Columbia Bd. of Educ.*, C.A. 78-1646 (D.D.C. Sept. 13, 1978). Numerous other lawsuits raising claims under both acts had been filed and were awaiting decision.

13. See the numerous administrative policy interpretations and rulings under both statutes collected in the Education for the Handicapped Law Report, vols. 2, 3 (CRR Publishing Co.).

14. The EAHCA was enacted in 1975 as P.L. 94-142; §505 was enacted in 1978 as part of P.L. 95-602.

usual enough to find that a subsequent statute has repealed an earlier act by implication, *Kremer v. Chemical Construction Co.*, 456 U.S. 461 (1976); it is entirely unprecedented to find the reverse.

*Amici* recognize that a different analysis might be required if the EAHCA actually forbade awards of attorney's fees in cases raising claims cognizable under that statute. Under such circumstances, the EAHCA and §505 would be in conflict, and the Court would necessarily face the question of which controls. *Cf. Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). Such problems of statutory construction do not arise, however, where (as here) no conflict exists. *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). Congressional silence on the issue of attorney's fees in one statute simply cannot, under this Court's precedents, constitute the basis for nullification of express language on the subject in another enactment.[15]

It does not necessarily follow, and the Court need not here decide, that every case raising claims under the EAHCA also presents substantial §504 issues and therefore may result in a fee award. Arguably, some claims involving the provision of education to a handicapped child do not constitute substantial claims under §504 and therefore could not implicate §505.[16] That issue, however, is not present in this case, since petitioners' claims

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15. These principles are entirely consistent with the "American rule" that an award of counsel fees requires express authorization, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *Alyeska* contains no requirement that *every* statute under which a claim might have been raised contain such an express provision. Here, since §505 expressly authorizes fees, the requirements of *Alyeska* are fully met.

16. For example, the EAHCA requires that the school system develop a written "individualized education program," containing specified information and developed in accordance with specified procedures for each handicapped child, 20 U.S.C. §1401(19). Section 504 does not necessarily impose identical requirements, 34 C.F.R. §104.33(b)(2).

here were well within the anti-discrimination mandate of §504.[17] Section 505 clearly instructs *at least* that fees be made available here, and in the face of such clear Congressional instructions this Court's "inquiry comes to an end," *Howe v. Smith*, 452 U.S. 473, 483 (1981).[18]

Thus, the plain language as well as the legislative history of §505 mandate an award of fees to petitioners herein.

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17. This is not a case in which plaintiffs sought to establish the content of an "appropriate" education for a handicapped child, as did plaintiffs in *Bd. of Educ. v. Rowley*, *supra*. There was no dispute between the parties concerning the appropriateness of Tommy's program; the question was instead whether respondents would continue to fund that program. Therefore, the issue of whether attorney's fees are recoverable by the prevailing party in a case such as *Rowley* is not before the Court.

18. This construction of §505 also does not imply that plaintiffs in such cases are relieved from their obligation to exhaust administrative procedures. Virtually any §504 claim that also falls within the EAHCA is, like the EAHCA claim, subject to exhaustion; moreover, the administrative procedures in question will be either identical or equivalent to those afforded under the EAHCA. 34 C.F.R. §104.36 provides:

> A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the . . . educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of §615 of the Education of the Handicapped Act [20 U.S.C. §1415] is one means of meeting this requirement.

Thus, §505 simply does not come into play in such cases until exhaustion has occurred. *See Turillo v. Tyson*, 535 F.Supp. 577 (D.R.I. 1982); *Patsel v. Dist. of Columbia Bd. of Educ.*, 530 F.Supp. 660, 665 (D.D.C. 1982).

B. *Section 504 and the EAHCA Grant Independently Enforceable Substantive Rights*

While it did not decide the issue, the Court of Appeals expressed uncertainty over whether the EAHCA "indicate[s] a congressional intent to preclude 'overlapping' actions under §504." 703 F.2d at 9-10. If Congress had intended the EAHCA to "preclude" a plaintiff from relying on §504 wherever the claim might alternatively be raised under the EAHCA, attorney's fees under §505 might indeed be unavailable here; concededly, §505 is inapplicable where there exists no §504 claim. However, the language and history of the two statutes demonstrate that they were intended to create independent substantive rights.

Section 504, enacted in 1973, prohibits discrimination on the basis of handicap in "any" federally-assisted program. By its terms, §504 applies to federally-assisted programs of elementary and secondary education as well as to all other federally-funded activities.[19] The EAHCA, enacted two years later, is a funding statute which authorizes grants to assist states with the education of handicapped children. In states that choose to accept such grants, education programs for handicapped children are required to meet the substantive requirements of the EAHCA. *Board of Education v. Rowley, supra.*

Unquestionably, the requirements of the EAHCA and §504 overlap in some (although certainly not all)[20]

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19. In a remark directly applicable to the facts of the present case, Senator Humphrey, the primary sponsor of S. 3044, the 1972 bill that became the model for §504, stated:

> [T]oo often we keep children, whom we regard as "different" or a "disturbing influence", out of our schools and community activities altogether, rather than help them develop their abilities in special classes and programs. . . .
>
> Every child — gifted, normal, and handicapped — has a fundamental right to educational opportunity . . .

118 Cong. Rec. 525 (1972).

20. The class of individuals protected by the EAHCA differs from that protected by §504 in certain respects. *See infra; Georgia*

respects. It does not follow, however, that the EAHCA displaced §504 with respect to those overlapping areas — *i.e.*, that it repealed §504 by implication as to such claims. This Court has consistently held that repeals by implication are not favored, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 88 (1982); *Watt v. Alaska, supra*, 451 U.S. at 266-67, quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974). Such repeals may be found only under the circumstances specified in *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936):

> . . . (1) [W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . .

*Kremer v. Chemical Construction Co., supra*, 456 U.S. at 468; *Radzanower v. Touche Ross, supra* (reaffirming *Posadas*). Neither of these requirements, however, is met here.

First, in the absence of "manifest" Congressional intent to repeal, no repeal may be found unless an actual and irreconcilable *conflict* exists. *Watt v. Alaska, supra*, 451 U.S. at 266-67; *Posadas v. National City Bank, supra*. Here, there is no conflict between the statutes. The acts are by their terms entirely consistent. Moreover, the substantial body of caselaw decided under both acts reveals no instance in which such a conflict has been alleged, much less found to exist. In the absence of

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*Association of Retarded Citizens v. McDaniel, supra. See also* the differing definitions of "handicapped" under the two statutes, 20 U.S.C. §1401(1) and 29 U.S.C. §706(6); the express age limitation contained in the EAHCA, 20 U.S.C. §1412(2)(B); and the regulations at 34 C.F.R. §104.4, which have no counterpart under the EAHCA.

a conflict, the mere fact that the EAHCA is more specific than §504 does not demonstrate that a repeal by implication occurred.

The federal Department of Education (DOE),[21] which is charged with enforcement of the two statutes, likewise treats the acts as affording independent, consistent rights. *See* 42 Fed. Reg. 22690-92 (May 4, 1977) and 42504 (Aug. 23, 1977) (adopting regulations under the two acts and stating that such regulations, while differing in certain respects, are consistent with each other).[22] Accordingly, DOE administratively enforces both statutes.[23] DOE's view that the statutes impose no conflicting requirements merits deference here. *Blum v. Bacon*, 457 U.S. 132 (1982).

Moreover, as the Court of Appeals for the Eleventh Circuit has observed, the existence of significant differences between the two statutes argues against the conclusion that one was intended to displace the other. *Georgia Association of Retarded Citizens v. McDaniel, supra*, 716 F.2d at 1578-79. First, the statutes have two distinct purposes. §504 is a civil rights statute "patterned after Title VI of the Civil Rights Act of 1964." *Community Television of Southern California v. Gottfried, supra*, 103 S.Ct. at 892; *New York Association for Retarded Children v. Carey, supra*, 612 F.2d at 649 (§504 "intended to be part of the general corpus of discrimination law"). The EAHCA, by contrast, is a funding act. *Board of Education v. Rowley, supra*. As a consequence of this distinction, the EAHCA applies only within those states that accept EAHCA grants. Section

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21. In 1979, DOE assumed the functions of the Department of Health, Education and Welfare in the area of education. For simplicity, we refer to both agencies as "DOE."

22. *See also* 41 Fed. Reg. 56967 (Dec. 30, 1976).

23. §504 is enforced by DOE's Office for Civil Rights. The EAHCA is enforced by DOE's Office of Special Education and Rehabilitation Services.

504, however, applies wherever federal assistance is present, whether in the form of federal education funds or otherwise. It would be bizarre indeed to conclude that Congress intended to repeal §504 with respect to certain types of education claims in states such as Arizona, which accepts EAHCA grants, but not in New Mexico, which does not.[24] As the Eleventh Circuit has observed, such considerations point strongly to the conclusion that, even in their areas of overlap, the two acts grant independent substantive rights. *Georgia Association of Retarded Citizens v. McDaniel, supra,* 716 F.2d at 1579.

It is not merely the content of the two statutes that argues against any inference that one was intended to repeal the other. The legislative history shows unequivocally that Congress intended precisely the opposite. Referring to §504, the Senate Report on the EAHCA stated:

> In earlier legislation adopted by this Committee and enacted into law, strong positive action was taken to prohibit discrimination on the basis of handicapping conditions in all programs receiving Federal funds. Regulations implementing this program (§504 of the Rehabilitation Act of 1973) are in draft form at this time. The Committee takes further steps in this legislation to provide that positive action be taken against erroneous classification of poor, minority and bilingual children and against the invalid use of testing.[25]

Thus, the Senate acknowledged that §504 was in force, that regulations thereunder were in preparation, and that the EAHCA was intended not to supplant §504 but to afford "further" protections. The Senate additionally stated:

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24. *See New Mexico Association for Retarded Citizens v. New Mexico, supra.*

25. S. Rep. No. 94-168, 94th Cong., 1st Sess. 28 (1975), reprinted in 1975 U.S. Code Cong. & Adm. News 1425, 1451-52.

> [T]he Committee expects the Commissioner of Education to take such action as may be necessary consistent with his responsibilities under §504 of the Rehabilitation Act of 1973 to assure that physical education and all other services normally provided to all children are made available for handicapped children.[26]

In the face of explicit indications of Congressional intent *not* to preclude the application of §504, and in the absence of even a suggestion to the contrary, it is impossible to find that an implied repeal occurred. *Kremer v. Chemical Construction Co., supra.*

The circumstances of this case are therefore totally unlike those in such cases as *Brown v. General Services Administration*, 425 U.S. 820 (1976). In *Brown*, the Court found extensive evidence in the language and legislative history of Title VII of the Civil Rights Act of 1964 that Congress had intended, by passing that statute, to create the sole cause of action for federal employment discrimination. However, the Court also made clear that absent evidence of Congressional intent to restrict potential causes of action, one statute will not be held to have precluded or repealed the rights available under another. Thus, for example, Title VII does not preempt claims under 42 U.S.C.A. §1981 with respect to private employment. *Brown*, 425 U.S. at 833; *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).[27] As demonstrated above, and as the Eleventh Circuit has observed

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26. S. Rep. No. 94-168, *supra*, at 12, reprinted in 1975 U.S. Code Cong. & Adm. News, *supra*, at 1436.

27. *See also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 n.5 (1970) (Title II of Civil Rights Act of 1964 did not preclude cause of action on same facts under 42 U.S.C. 1983 and Fourteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (no preclusion of one civil rights statute by another); *cf. Carlson v. Green*, 446 U.S. 14 (1980) (*Bivens* action available in the absence of "explicit Congressional declaration" that such is precluded by Federal Tort Claims Act).

in distinguishing *Brown*, a finding of Congressional intent to preclude or repeal simply cannot be made with respect to the EAHCA and §504. *Georgia Association of Retarded Citizens v. McDaniel, supra*, 716 F.2d at 1579.

Likewise distinguishable from the present case are *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). In those cases, plaintiffs' claims arose under federal statutes that provided substantive rights together with comprehensive enforcement mechanisms. In both instances, plaintiffs failed to utilize the prescribed enforcement procedures, instead seeking to enforce the statutes via 42 U.S.C.A. §§1985(3) and 1983, respectively. The question was whether the use of these alternative enforcement routes was permissible. As in *Brown*, the Court resolved the issue by examining Congress' intent, concluding in both cases that the legislative history showed evidence of a plan to preclude enforcement via routes other than those specifically prescribed. As we have demonstrated, however, the present case involves an entirely different situation: here there is no evidence that Congress intended by enacting the EAHCA to preclude the assertion of §504 claims based on similar facts.

Moreover, the statutes invoked by plaintiffs in *Novotny* and *Middlesex* — 42 U.S.C.A. §§1985(3) and 1983 — themselves create no rights. Hence, as the Court recognized, neither case presented an issue of implied repeal of substantive entitlements. *Novotny*, 442 U.S. at 376. If — as *Novotny* and *Middlesex* teach — a strong showing of Congressional intent is required before preclusion of an *enforcement route* will be found, surely even more compelling evidence is needed in order to find that Congress actually withdrew *substantive entitlements*. Such evidence is lacking, however, with respect to the rights conferred by §504.

In summary, neither §504 nor §505 contains an exception, express or implied, for cases that also fall within

the scope of the EAHCA. Accordingly, the courts have awarded fees under §505 in numerous cases wherein EAHCA claims were also asserted. *Tatro v. Texas*, 625 F.2d 557 (5th Cir. 1980), *on remand*, 516 F.Supp. 968 (N.D. Tex. 1981), *aff'd, supra, cert. granted, supra; Pratt v Board of Education of Frederick Co.*, 674 F.2d 259 (4th Cir. 1982); *Gregg B. v. Board of Education*, 535 F.Supp. 1333 (E.D. N.Y. 1982); *Patsel v. District of Columbia Board of Education, supra.*[28] As the *Patsel* court observed, 530 F.Supp. at 665-66:

> No indication has been found that the EHA alone must be applied to cases in which the EHA is applicable, i.e. that the two were mutually exclusive. . . . [§505] does not state that fees should not be awarded if the action or proceeding is one which happens to involve rights in addition to those secured by a provision of the Rehabilitation Act. In other words, §505 is not explicitly limited to actions which can be brought only under a Rehabilitation Act provision, such as §504, and no other, such as the EHA. The statute could have been so limited, if that were the intent, since both the EHA and §504 were already in existence, as were their coordinated and consistent regulations. It was not limited, however. . . .
>
> In sum, neither the EHA nor its legislative history indicates that the EHA was intended to be exclusive when compared to §504 . . .

The task confronting this Court in relation to §505 is thus straightforward: the plain language of that statute should be given effect. The judgment of the Court of Appeals on petitioners' motion for attorney's fees under §505 of the Rehabilitation Act must be reversed.

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28. *Contra, Timms v. Metropolitan School Dist., supra; Dept. of Educ. v. Katherine D.*, No. 82-4096 (9th Cir., Nov. 7, 1983).

## II. PETITIONERS ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT

The Civil Rights Attorney's Fees Awards Act, 42 U.S.C.A. §1988 (hereafter §1988) provides in relevant part:

> In any action or proceeding to enforce a provision of §§1981, 1982, 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case is indisputably "an action or proceeding to enforce" 42 U.S.C.A. §1983 ("§1983").[29] The Smiths specifically invoked that statute to redress violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Indeed, their original Complaint, which was filed before the effective date of the EAHCA, raised solely constitutional claims. The major Due Process violation asserted was respondents' failure to afford Tommy a hearing before terminating the funding for his public education program. The Equal Protection claim was in essence that the termination of Tommy's education program on the basis of his handicap was without a rational basis, and therefore constituted illegal discrimination.[30] By way of relief, the Smiths sought a preliminary injunction reinstating the

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29. §1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

30. Complaint at 3; Second Amended and Supplemental Complaint at 8.

funding for Tommy's program during the pendency of administrative proceedings, and an order permanently enjoining respondents to provide Tommy with education services.[31]

In their Amended Complaints, the Smiths also raised alternative statutory bases for the foregoing relief. Certainly, the assertion of these statutory theories did not lessen the viability of the §1983 claims under the Due Process and Equal Protection Clauses, nor did it remove the case from the scope of §1988. On the contrary, a case raising substantial constitutional claims under §1983 remains within §1988 even when other legal grounds are also advanced to support the relief sought. *Maher v. Gagne, supra.*[32]

A plaintiff "prevails" within the meaning of §1988 if he "succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.*, 103 S. Ct. at 1939 (1983). It is of no moment that such benefit is obtained via settlement rather than through an adjudication. *Maher v. Gagne, supra.*

Petitioners meet all of the requirements for an award of fees under §1988. First, their constitutional claims were clearly substantial. The District Court found that petitioners were likely to succeed on their Due Process claim of entitlement to a prior hearing and granted a preliminary injunction on that basis, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970). Moreover, the courts have held that the deprivation of educational services to a child on account of the child's handicap raises a substantial Equal Protection Claim. *PARC v. Pennsylvania, supra; Mills v. Board of Education*, 348 F. Supp. 866 (D. D.C. 1972); *Fialkowski v. Shapp*, 405 F.Supp. 946 (E.D. Pa. 1975); *William S. v. Gill*, 536 F. Supp. 505 (N.D. Ill. 1982).

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31. *Id.*

32. Constitutional claims are "substantial" if they are not inescapably frivolous under previous decisions. *Hagans v. Lavine*, 415 U.S. 528, 537-38 (1974).

Furthermore, petitioners obtained the relief they sought: respondents were preliminarily and permanently enjoined to provide free education services to Tommy. Unquestionably, then, petitioners more than met the *Hensley* requirement ("some of the benefit . . . sought in bringing suit") for an award under §1988.

Notwithstanding the existence of that statute, however, the Court of Appeals held that it could find no "affirmative congressional sanction for fees in this situation." This was because petitioners' constitutional claims rested on the same factual bases as their claims under the EAHCA. 703 F.2d at 7-8. In effect, the court exempted from the scope of §1988 those cases in which the EAHCA would have provided an alternative basis for the relief sought.

Such a construction of §1988 is totally contrary to this Court's holding in *Maher v. Gagne, supra*. Plaintiff in *Maher* attacked the validity of a state welfare regulation, basing her challenge — as did petitioners herein — on constitutional and federal statutory grounds. The case was eventually settled, and attorney's fees were awarded under §1988. This Court affirmed the award, holding unanimously that the presence of a substantial constitutional claim brought the case within §1988 regardless of whether the statutory claims alone could have resulted in a fee award:[33]

> . . . Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication. . . . [S]uch a fee award "furthers the Congressional goal of encouraging suits to vindicate constitutional

33. The concurring opinion in *Maher* makes clear that the entire Court agreed on this point.

> rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." It is thus an appropriate means of enforcing substantive rights under the Fourteenth Amendment [citations omitted]. . . .
> The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act.

*Maher*, 448 U.S. at 132-33 and n. 15.

The principle announced in *Maher* has been repeatedly applied in special education cases in which substantial constitutional claims were raised. In *Espino v. Besteiro*, 708 F.2d 1002 (5th Cir. 1983), the Court of Appeals for the Fifth Circuit reversed the denial of a Section 1988 award in a suit asserting that the placement of a handicapped child in a separate cubicle within the schoolroom violated his Due Process and Equal Protection rights. The EAHCA and §504 were also advanced as alternative theories, and relief was ultimately granted solely under the EAHCA. Nevertheless, noting that the constitutional claims had been substantial, the Court of Appeals held that fees should have been awarded under §1988. The Court relied on *Maher v. Gagne, supra*, and also observed, 708 F.2d at 1010:

> Were we to hold, on the facts of this case, that [plaintiff] is not entitled to §1988 fees because the district court did not explicitly ground its relief on §1983, we would in effect be creating a powerful disincentive to settlement in close cases. Where defendants know that a court is more likely to award relief on the basis of a non-fee statute whose application avoids difficult constitutional questions, they will have little incentive to settle their differences with plaintiffs, knowing as they do that a settlement is very likely to cost them substantial attorney's fees.

> Federal dockets are already sufficiently crowded without our creating a disincentive to settlement. Permitting a court to deny §1988 fees by granting relief on the basis of a non-fee statute would also undermine Congress' intent in enacting §1988 to create an incentive for plaintiffs to vindicate violations of their constitutional rights by bringing §1983 actions.

Similar conclusions were reached by the Eighth Circuit in *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982), *cert. denied sub nom. Rose v. Nebraska*, 103 S.Ct 1252 (1983); *accord, Robert M. v. Benton*, 671 F.2d 1104 (8th Cir. 1982). The Second Circuit has taken an identical approach. *Hastings v. Maine-Endwell Central School District*, 676 F.2d 893 (2d Cir. 1982); *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982).[34] *But see Timms v. Metropolitan School District, supra; Department of Education v. Katherine D., supra.*

It does not follow, as the Court of Appeals apparently feared, that the "mere recitation of a §1983 claim" in a special education case will create a right to attorney's fees under §1988. 703 F.2d at 8. The courts retain the power to determine that a constitutional claim asserted via §1983 is insubstantial and therefore cannot support a §1988 award.

The Court of Appeals was also mistaken in its application of *Middlesex County Sewerage Authority v. National Sea Clammers Association, supra*, to this case. In *Middlesex*, the Court found that Congress had intended §1983 to be unavailable to enforce an anti-pollution *statute*. Petitioners in *Middlesex* had sought such enforcement under the "and laws" language of §1983. However, *Middlesex* in no way curtailed the use of §1983 to enforce rights "secured by the Constitution." Moreover,

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34. Other special education cases reaching like results include *Gary B. v. Cronin*, 542 F. Supp. 102 (N.D. Ill. 1982) and *Mattie T. v. Holladay*, 522 F. Supp. 72 (N.D. Miss. 1981).

there exists no other conceivable basis for a finding that the EAHCA was meant to limit the enforcement of constitutional rights via §1983: the EAHCA itself contains no such language, and the legislative history expresses precisely the opposite purpose.[35] *See also Kremer v. Chemical Construction Co., supra* (implied repeal only where "manifest" legislative intent or irreconcilable conflict.)

In short, where the constitutional claim is substantial and plaintiff obtains the relief sought thereunder, the import of §1988 is clear: fees are to be awarded. Here there is no dispute over the substantially of petitioners' claims, nor can there be any doubt that they obtained the relief that they sought. Under these circumstances, the Court of Appeals erred in denying petitioners' request for attorney's fees under §1988.

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35. The legislative history repeatedly refers to cases defining the constitutional rights of handicapped children, and expresses the intent that the grant program authorized by the EAHCA *assist* the states in meeting their constitutional obligations. There is not the slightest suggestion that the statute was intended to curtail the enforcement of constitutional rights. S. Rep. 94-168, *supra*, at 6-8, reprinted in 1975 U.S. Code Cong. & Adm. News, *supra*, at 1430-32; H. Rep. 94-332, 94th Cong., 1st Sess. 3-4, 10 (1975); S. Rep. 94-455 (Conf. Rep.) 94th Cong., 1st Sess. 28-29 (1975), reprinted in 1975 U. S. Code Cong. & Adm. News 1480, 1482; 121 Cong. Rec. 19485 (remarks of Sen. Williams); 19504 (Sen. Schweiker); 19504-05 (Sen. Humphrey); 25534 (Rep. Brademas); 25538 (Rep. Harris); 37027 (Rep. Gude); 37029 (Rep. Michel); 37417 (Sen. Schweiker); 37419 (Sen. Beall); 37420 (Sen. Hathaway) (1975).

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the First Circuit.

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No. 82-2120

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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THOMAS F. SMITH, JR., *et al.*,
*Petitioners,*

v.

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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## BRIEF OF THE ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES AMICUS CURIAE

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## QUESTION PRESENTED BY *AMICUS*

Can plaintiffs, who allege a substantial Rehabilitation Act claim in addition to substantial constitutional claims, none of which is addressed in view of plaintiffs' total success on a nonfee statutory claim, be denied an award of attorney's fees under the Rehabilitation Act, 29 U.S.C. § 794a(b), contrary to the express intent of Congress?

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-2120

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THOMAS F. SMITH, JR., *et al.*,
*Petitioners,*

v.

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

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## BRIEF OF THE ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES AMICUS CURIAE

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### INTEREST OF THE *AMICUS*

*Amicus,** the Association for Children and Adults with Learning Disabilities, ("ACLD"), is a volunteer association with over 60,000 members in 800 chapters in the fifty states and the District of Columbia. The membership is composed of learning disabled individuals, par-

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* Pursuant to Rule 36.2 of the Rules of this Court, letters of consent from the parties have been filed with this brief.

ents of the learning disabled, and professionals from fields such as education and psychology who work with learning disabled people. According to the United States Department of Education, learning disabled students comprise the largest group of handicapped children in the United States. ACLD's paramount purpose is promoting the education and welfare of those with learning disabilities.

ACLD has long been vigilant in protecting the rights of those with learning disabilities. ACLD initiated and was the prime mover in the successful effort to amend the Elementary and Secondary Education Act ("ESEA") to include learning disabilities. Since the amendment of ESEA in 1970, ACLD has worked closely with the Bureau of Education for the Handicapped (subsequently the Office of Special Education and now, Special Education Programs) of the Department of Health, Education and Welfare (now Department of Education) in an effort to increase the quality and quantity of educational and vocational rehabilitation programs provided to all handicapped people, not only the learning disabled.

ACLD and its members worked strenuously for the passage of Section 504 of the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975. ACLD views the Rehabilitation Act as the cornerstone of the nation's commitment to erradicate discrimination on the basis of handicap. ACLD fought vigorously for the passage of the Rehabilitation Act and the Education for All Handicapped Children Act to "open the door" to public education for millions of handicapped children.

*Amicus* views Section 505 of the Rehabilitation Act as the latest and most important Congressional enactment devised to protect the rights of the handicapped. This section, providing for attorney's fees for those who prevail in a challenge to discrimination on the basis of handicap, enables many of the formerly powerless to success-

fully assert their rights and to vindicate the national policy of equality for the handicapped.

Although *Amicus* completely agrees with the petitioners' position concerning the availability of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, *Amicus* also recognizes that the interpretation of Section 505 in this case may significantly determine the scope of enforcement of the civil rights of handicapped persons. ACLD believes that only an interpretation of Section 505 consistent with the congressional intent to allow fees for *all* of those who successfully challenge discrimination will afford private individuals the protection they require and will help the nation reach its goal of ending discrimination.

## SUMMARY OF ARGUMENT

Section 504 is the first federal statutory guarantee of protection against discrimination based on handicap. It enables qualified individuals to enforce their right to participate in the mainstream of American society and establishes that "mere possession of a handicap is not a permissible ground for assuming an inability to function."

Section 504 has particular significance for handicapped children, ensuring the provision of an appropriate education and related services in any federally-funded program. Since Section 504 mandates that handicapped children have the opportunity to *benefit* from educational programs for which they qualify, public school systems have the responsibility to make special education programs *meaningful* for those children. This mandate has been embodied in regulations of the United States Department of Education which subsequently have been approved by Congress.

Section 504 complements and reinforces the Education for All Handicapped Children Act of 1975. Although

clearly related and aligned in their purposes, the two statutes are independent. Among other differences, they contain separate definitions of "handicapped individuals," program requirements, and target populations. Congress intended that these two statutes form the foundation of a national commitment to erradicate discrimination on the basis of handicap.

Section 504 was amended in 1978 to provide for an award of attorney's fees to those handicapped individuals who successfully litigate their right to be free from discrimination. In passing this fees provision, Congress expressly sought to correct the omission of disabled people from those groups entitled to receive fees for vindicating their rights. This new section—Section 505—explicitly applies to handicapped children who must seek the courts' intervention to protect their right to an appropriate education.

A major reason for the passage of Section 505 was Congress' recognition that the availability of attorney's fees is often the difference as to whether handicapped children will be able to assert their right to special education. Since Section 504, along with other civil rights laws, depends heavily upon private enforcement, Congress did not exclude from fee awards under Section 505 cases that also involve claims under the Education for All Handicapped Children Act.

Congress also intended that the provision of fees would encourage the administrative process established by Section 504 and the Education for All Handicapped Children Act to function equitably and efficiently. Section 505 expresses the intent of Congress to *aid* all handicapped children seeking an appropriate education.

## I. SECTION 504 PROTECTS HANDICAPPED CHILDREN'S RIGHT TO NONDISCRIMINATION IN EDUCATION.

### A. Under Section 504 There Is a Private Right of Action to Remedy Discrimination on the Basis of Handicap.

The Rehabilitation Act of 1973, *as amended*,[1] is the first federal statutory guarantee of protection against discrimination based upon handicap. It is from this statute, which embodies a national commitment to bring disabled persons into the "mainstream" of American society, that Tommy Smith's right to an appropriate education flows. It is also as a result of this national commitment that Tommy and his parents were able to enforce that right.

After this Court's decisions in *Guardians Association v. Civil Service Commission of the City of New York*, 103 S.Ct. 3221 (1983), and *Cannon v. University of Chicago*, 441 U.S. 677 (1979), holding that private rights of action exist under Title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d-2000d-6] and Title IX of the Education Amendments of 1972 [20 U.S.C. § 1681],[2] there

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[1] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1980) ("Section 504"), provides in pertinent part: "No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 505, 29 U.S.C. § 794a (Supp. V 1980), is the accompanying attorney's fees provision.

[2] "Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 [Title VI] of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 . . . and section 901 of the Education Amendments of 1972, [Title IX] 20 U.S.C. 1683 . . . This section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap . . . This approach to implementation of Section 504, which closely follows the models of the above-cited antidiscrimination provisions,

can be no doubt as to the availability of a private right of action to enforce Section 504, *as amended*, 29 U.S.C. § 794.[3]

It is equally clear that this private right of action under Section 504 of the Rehabilitation Act of 1973, *as amended*, (hereinafter cited as "Section 504"), applies to cases involving claims of discrimination on the basis of handicap in the provision of educational services to handicapped students:

> Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services or any other Federally-aided programs. *Examples of handicapped individuals who may suffer discrimination in the receipt of Federally-assisted services but who may have been unintentionally excluded from the protection of section 504 by the references to enhanced employability in section 7 (6) are as follows: physically or mentally handicapped children who may be denied admission to Federally supported school systems on the basis of their handicap.*

H.R. Rep. No. 1457, 93d Cong., 2d Sess. 25 (1974) (emphasis added). *See New Mexico Association for Retarded*

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would ensure administrative due process . . . provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*" H.R. Rep. No. 1457, 93d Cong., 2d Sess. 27 (1974) (emphasis added).

[3] Initially, the question of a private right of action to enforce Section 504 was before the Court in *Consolidated Rail Corp. v. Darrone ("Lestrange")*, No. 82-862, Brief for Petitioner, 30-48, but it would appear that, based upon the authorities set out above, all involved in *Lestrange* agree that there is no longer any doubt concerning the existence of a private right of action under Section 504. Brief for Respondent, 5-16, Brief for the United States as *amicus curiae*, 5-10, and Reply Brief for Petitioner, 2-3.

*Citizens v. New Mexico* (hereinafter cited as "*NMARC v. New Mexico*"), 678 F.2d 847, 855 (10th Cir. 1982) ("Section 504's prohibition against discrimination represents a step toward attainment of equality in education for the handicapped."); *Doe v. Marshall*, 459 F. Supp. 1190, 1191 (S.D. Tex. 1978), *vacated as moot*, 622 F.2d 118 (5th Cir. 1980) ("A review of the legislative history and the cases which illuminate § 794 reveal that this congressional enactment, for practical purposes, places upon school districts and agencies which receive federal funds, such as the defendants, the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education.")[4]

### B. Section 504 Requires That Handicapped Children Be Provided an Appropriate Education.

By its terms, Section 504 prohibits more than the mere exclusion of students on the basis of handicap from federally-funded education programs. The statute also forbids any denial of benefits of, or discrimination in, such programs on the basis of handicap. Based upon this Court's holding delineating the scope of Title VI in *Lau v. Nichols*, 414 U.S. 563, 566 (1974),[5] the Tenth Circuit has held: "Students who are handicapped, often by speech or hearing impairments or other learning disabilities, are similarly foreclosed from any meaningful education."

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[4] *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 103 S.Ct. 230 (1982); *New York State Ass'n for Retarded Citizens v. Carey*, 612 F.2d 644 (2d Cir. 1979); *David H. v. Spring Branch Indep. School Dist.*, 569 F. Supp. 1324 (S.D. Tex. 1983); *Howard S. v. Friendswood Indep. School Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D. W.Va. 1976).

[5] "There is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Lau v. Nichols*, 414 U.S. 563, 566 (1974).

*NMARC v. New Mexico*, 678 F.2d at 854. Other courts that have considered the question uniformly have found that Section 504 ensures an appropriate education to handicapped children:

> It is clear that Section 504 prohibits a handicapped individual from being denied the benefits of an educational program which receives federal financial assistance. This language shows that the congressional intent was not merely to prohibit the denial of access to such programs, but also to give handicapped persons an opportunity to enjoy the benefits of, and have access to, such programs. It indicates that special treatment or additional services may be necessary for the handicapped person to fully enjoy the benefits of his education. *Mere access to conventional education may not be sufficient. If Congress had intended only to prohibit the denial of access to federally funded educational programs, it could easily have done so.*

*Georgia Association for Retarded Citizens v. McDaniel* (hereinafter cited as *"GARC v. McDaniel"*), 511 F. Supp. 1263, 1280 (N.D. Ga. 1981), *aff'd*, 716 F.2d 1565 (11th Cir. 1983) (emphasis added).[6]

Moreover, those charged with administering Section 504 have recognized its mandate for appropriate special education. The regulations promulgated pursuant to Section 504, 34 C.F.R. §§ 104.01-104.10 and 34 C.F.R. §§ 104.31-104.39 (1982),[7] clearly delineate this guaran-

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[6] "The statute, then, does not merely prohibit the denial of access to federally funded programs but also gives handicapped persons an equal opportunity to enjoy the benefits of such programs. It indicates that special treatment or additional services may be necessary for the handicapped person to fully enjoy the benefits of his education, and mere access to conventional education may not be sufficient." *David H. v. Spring Branch Indep. School Dist.*, 569 F. Supp. at 1333.

[7] The regulations were originally promulgated by the Department of Health, Education and Welfare. Pursuant to § 601 of P.L. 96-88,

tee of appropriate education to handicapped students. Of course, in order for Section 504's protections to apply, the handicapped person must be able to achieve benefit from the appropriate provision of educational services as this Court has instructed in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), but no issue has been raised as to Tommy Smith's being "otherwise qualified" to benefit from an appropriate educational program and placement. The Rhode Island legislature has recognized that Tommy Smith and other handicapped children can benefit from an appropriate educational program. R.I. Gen. Laws § 16-24-1 (1981) and R.I. Const. art. 13, § 1. As the record indicates, Tommy progressed in the program at Bradley Hospital and was able to move to a less restrictive placement at the Harmony Hill School. J. App. at 127. *Kruelle v. New Castle County School District*, 642 F.2d 687, 693 (3d Cir. 1981); *Jose P. v. Ambach*, 557 F. Supp. 1230 (E.D.N.Y. 1983).[8]

As has been noted, "The teeth of § 504 are provided by its extensive regulations." Stafford, *Education For The Handicapped: A Senator's Perspective*, 3 Vt. L. Rev. 71, 80 (1978).[9] In *Southeastern* this Court recognized

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the Department of Education Organization Act, 20 U.S.C. § 3401 (1981), the authority was transferred to the Department of Education on May 4, 1980. Executive Order No. 12212, 45 Fed. Reg. 29,557 (1980). Both agencies will be referred to as the "Department."

[8] "But ever since [*PARC*] and [*Mills*], it has never been considered that handicapped children were 'unqualified' to receive an appropriate public education. Those cases were decided before the enactment of section 504. Moreover, the Education for Handicapped Act made it clear that Congress recognized that, far from being 'unqualified' for a public education, a handicapped child had a right to an appropriate public education. Thus, extensive modifications which might be 'substantial' in other contexts may be reasonable efforts to educate handicapped children." *Jose P. v. Ambach*, 557 F. Supp. at 1235.

[9] While this is obviously not contemporaneous legislative history, Senator Stafford was a prime sponsor of Sections 504, 505, and the EHA, *Patsel v. District of Columbia Bd. of Educ.*, 530 F. Supp. 660, 666 n. 7 (D.D.C. 1982), and as this Court has held, "[I]t is the

the vital role that the Department has in the enforcement scheme of § 504, "[I]dentification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." *Southeastern Community College v. Davis*, 442 U.S. at 413.

In drafting the implementing regulations, the Department recognized that Section 504's prohibition against discrimination requires that public school systems provide an appropriate education as well as the related services handicapped children require.[10] This recognition

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sponsors that we look to when the meaning of the statutory words is in doubt," *Woodwork Manufacturers' Ass'n v. NLRB*, 386 U.S. 612, 640 (1967), and "[A] statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1975).

[10] The Department found that Section 504 mandated: "(1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguards be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children . . . a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense."

"These regulations conform to the standards established for the education of handicapped persons in *Mills . . ., Pennsylvania Association For Retarded Children v. Commonwealth of Pennsylvania, . . . Lebanks v. Spears, . . .* as well as in the Education of the Handicapped Act, as amended by Pub. L. 94-142 (EHA)." 34 C.F.R. § 104 —Appendix A—Analysis of Final Regulations at 358-359 (1982). *PARC* held that the failure to provide education to mentally retarded children violated their rights to equal protection. *Mills* expanded this holding to cover all disabled children, resting on due process as well.

conformed with the established case law which held that failure of the public agencies to provide an appropriate education to children such as Tommy Smith violated the constitutional guarantees of equal protection and due process. *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972 and *Pennsylvania Association for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (1971), 343 F. Supp. 279 (E.D. Pa. 1972) (three judge court) (hereinafter cited as "*PARC*").

The Section 504 regulations were adopted in June of 1977, a year before Congress re-examined the Rehabilitation Act and added Section 505. *Patsel v. District of Columbia Board of Education*, 530 F. Supp. 660, 663 (D.D.C. 1982) (hereinafter cited as "*Patsel v. D.C. Bd. of Educ.*"). In passing Section 505, "the Senate report specifically noted the existence of the HEW regulations. . . . Moreover, the report noted that Section 505 did nothing more than codify the rights, remedies, and procedures found in the HEW regulations." *Jones v. Metropolitan Atlanta Transit Authority*, 681 F.2d 1376, 1382 (11th Cir. 1982) (hereinafter cited as *Jones v. MARTA*") (citing S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978)).[11]

As this Court has instructed:

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[11] Although this language could be interpreted as applying solely to subsection (a) of Section 505, its inclusion in the Report evidences Congress' detailed review and approval of the HEW regulations. The presumption that the regulators were following, "a consistent administrative construction of [the] statute," *Haig v. Agee*, 453 U.S. 280, 291 (1981), certainly applies here. Congressional acquiescence may sometimes be found from nothing more than silence in the face of an administrative policy. *Id.* at 300, *Zemel v. Rusk*, 381 U.S. 1, 11 (1965). However, as discussed in the text, in the case of the Section 504 regulations, "the inference of congressional approval" is supported by more than mere congressional inaction. *Haig v. Agee*, 453 U.S. at 300. In any event, it must be presumed that the legislators carefully considered the regulations before approving Section 505.

> 'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . . So, too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.' *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1981).

*Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 (1982) (citations omitted).

In sum, both the language of Section 504 and its judicial and regulatory interpretations make clear that the statute ensures an appropriate education for handicapped students.

## II. SECTION 504 AND THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT ARE INDEPENDENT AND COMPLEMENTARY STATUTES THAT REINFORCE AND RECIPROCATE EACH OTHER.

The Court of Appeals held, without citation to any authority, that "the EAHCA's [Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400-1461] comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act." *Smith v. Cumberland School Committee*, 703 F.2d 4, 10 (1st Cir. 1983).[12] This

[12] This holding appears to contradict the Court's language that, "the more specific rights created by the EAHCA may not indicate a congressional intent to preclude 'overlapping' actions under section 504." *Smith v. Cumberland School Comm.*, 703 F.2d at 9-10. If this language is intended by the Court as a recognition of a cause of action under Section 504, no explanation is suggested as to how a party can proceed under that section without being able to resort to Section 505. In view of the lack of citation for this holding, the apparent disregard for the plain meaning of the statute, *Howe v. Smith*, 452 U.S. 473 (1981), *North Dakota v. United States*, 103 S.Ct. 1095 (1983), and the erroneous conclusion that the existence

holding completely misinterprets the intent of Congress in passing those statutes.

There is clear evidence that both Houses saw the EAHCA as complementing and supplementing the Rehabilitation Act, not replacing it. In passing the EAHCA, the Senate emphasized:

> In earlier legislation adopted by this Committee and enacted into law, strong positive action was taken to prohibit discrimination on the basis of handicapping conditions in all programs receiving Federal funds. Regulations implementing this program (section 504 of the Rehabilitation Act of 1973) are in draft form at this time. The Committee takes further steps in this legislation to provide that positive action be taken.

S. Rep. No. 168, 94th Cong., 1st Sess. 28 (1975), and *see also* 37-38. The House was equally clear:

> [I]t may be noted that the 93rd Congress, and more specifically, this Committee, have already expressed their concern about increased individualization [in education] in at least two public laws: Public Law 93-112, the Rehabilitation Act Amendments of 1973, and Public Law 93-380, the Education Amendments of 1974 (Title I).

H.R. Rep. No. 332, 94th Cong., 1st Sess. 14 (1975).

This situation is virtually identical to those examined by this Court in *Johnson v. Railway Express Agency*, 421

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of a private right of action under Section 504 was in doubt, it seems clear that the Court of Appeals did not give the Section 505 issue due consideration. In addition, the Ninth Circuit, relying in part on the First Circuit's opinion in *Smith*, recently "conclude[d] that Congress foreclosed persons complaining of conduct protected by the EAHCA from asserting claims under the Rehabilitation Act." *Depart. of Educ. v. Katherine D.*, No. 82-4096, slip op. at 19 (Nov. 7, 1983). Given the absence of any legislative history cited by the Ninth Circuit to support that position and the legislative history cited here to oppose it, that view is of questionable validity.

U.S. 454 (1975) and *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In those cases the legislative histories of the statutes at issue were held to demonstrate congressional intent to provide complementary remedies.[13] As the legislative history of the EAHCA (and Section 504) similarly indicates, these two statutes, "although related, and although directed to most of the same ends, are separate, distinct, and independent." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 461.

This case is clearly distinguishable from *Brown v. GSA*, 425 U.S. 820 (1976). As the above language demonstrates, Congress envisioned the EAHCA as part and parcel of a scheme to eradicate discrimination against the handicapped. This Court in *Brown* did not set out a "bright line" test against which congressional intent to preempt existing remedies by subsequent enactments should be measured; rather, as in *Jones* and *Johnson*, the legislative history was found to be determinative. *Brown v. GSA*, 425 U.S. at 828. It is highly significant that the Senate committee considering the EAHCA did not "limit the right of individuals to seek redress of grievances through other avenues such as bringing civil action in Federal or State courts to protect and enforce the rights of handicapped children under applicable law." S. Rep. No. 168, 94th Cong., 1st Sess. 26 (1975).

In addition, there are major differences in the areas covered by the two laws. The EAHCA applies only to states that elect to participate in its funding and reporting mechanisms, 20 U.S.C. § 1412 (1981); Section 504 applies to all states and programs that receive *any* federal funds. *NMARC v. New Mexico*, 678 F.2d at 852. The EAHCA has a narrower definition of a handicapped child, 20 U.S.C. § 1401 (1) (1981), than the Rehabilita-

[13] In *Jones*, this Court held that unless specifically stated in the statute, it "cannot [be] assumed that Congress intended to effect any change, either substantive or procedural, in the prior statute." *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 416 n. 20.

tion Act. 29 U.S.C. § 706(7) (Supp. V 1980). The EAHCA has limited applicability to children under six and over sixteen, 20 U.S.C. § 1412(2)(B) (1981); Section 504 affords protection for all children. 34 C.F.R. § 104.32 (1982). Section 504 mandates program accessibility, 34 C.F.R. § 104.22(b) (1982); the EAHCA does not speak to this issue.

On the other hand, the EAHCA has specific requirements for maintaining confidential records on individual children, 20 U.S.C. §§ 1412(2)(D), 1417(c) (1981); Section 504 is silent in that area. The EAHCA requires, in most instances, exhaustion of administrative remedies before initiating suit. 20 U.S.C. § 1415(e)(3) (1981). Section 504 has been held not to require exhaustion of individual administrative remedies before commencing a civil action. *Fells v. Brooks*, 522 F. Supp. 30 (D.D.C. 1981). *See also, Sanders v. Marquette Public Schools*, 561 F. Supp. 1361, 1369 (W.D. Mich. 1983) ("I find that there is no exhaustion requirement as a precondition under the Act [Section 504]. There is no such requirement in the Act itself, no legislative history has been presented to support such a view, and the regulations under the Act are directed towards the procedures by which public agencies, not private individuals, may enforce the Act. The remedies available under the administrative procedure promulgated under the Act do not offer the private person compensation in any form for violation of the Act. The only administrative remedy is to terminate the federal funding.")

The EAHCA explicitly requires that a child's educational placement be maintained during the pendency of individual appeals under the statute. 20 U.S.C. § 1415(e)(3) (1981). Section 504 has no such explicit requirement, but has been employed when the EAHCA provides no jurisdictional basis for a suit to enforce the right to remain in *status quo* prior to the the completion of the administrative process. *Hymes v. Harnett County Board*

*of Education*, 664 F.2d 410 (4th Cir. 1982). *See also, Hastings v. Maine-Endwell Central School District*, 676 F.2d 893, 894-895 (2d Cir. 1982) (School system's attempt to immediately review student's placement after student had prevailed at an administrative hearing held to violate student's due process rights although permitted by the EAHCA.)

The Section 504 regulations, adopted while the EAHCA regulations were being promulgated, "do not defer to the EHA procedures, but merely refer to them in creating separate rights which may be independently or concurrently vindicated." *Patsel v. D.C. Bd. of Educ.*, 530 F. Supp. at 666. As this Court has held on numerous occasions,[14] such a determination by those charged with administering these acts—in this case, that the two statutes complement and reinforce one another—is entitled to great deference.

"[T]he EHA is closely aligned with Section 504, both in language and in purpose." *David H. v. Spring Branch Independent School District*, 569 F. Supp. at 1335 (S.D. Tex. 1983), *and see, S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981). As Senator Stafford, one of the drafters of the EAHCA, observed:

> The two laws and their regulations reinforce and reciprocate each other. No educational jurisdiction which receives federal funds and wishes to continue to receive them can escape their provisions.

Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 Vt. L. Rev. 71, 82 (1980),[15] *see supra* note 11.

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[14] *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

[15] Other commentators have also noted the close relationship between the EAHCA and Section 504. *See, e.g.*, National Association of State Directors of Special Education and National Association of State Boards of Education, *Answering Your Questions About P.L. 94-142 and Section 504*, 6 (1979) ("Questions about the Relation-

Finally, if Congress had intended for the EAHCA to limit, or affect in any way, the rights created under Section 504, it certainly could have said so. Section 504 was enacted pursuant to the Equal Protection Clause, U.S. Const. amend. xiv, § 5, *Association for Retarded Citizens of North Dakota v. Olson*, 561 F. Supp. 473 (D.N.D. 1982), and, as has been noted above, applies to all recipients of federal funds. The EAHCA, on the other hand, was passed partially pursuant to Congress' spending power, *Board of Education v. Rowley*, 458 U.S. 176, 204 (1982) (hereinafter cited as "*Bd. of Educ. v. Rowley*"), a more limited grant of authority than the Equal Protection Clause, and affords rights *only* to children in states that elect to participate in its provisions. Since the EAHCA was enacted only one year after Section 504 was specifi-

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ship Between P.L. 94-142 and Section 504"); United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 53 (1983) ("Another area of active litigation has been the application of Section 504 to elementary and secondary education."); Weinstein, *Education of Exceptional Children*, 12 Creighton L. Rev. 987, 1027 (1979) ("The significance of . . . the Rehabilitation Act is . . . the requirements of specially tailored programs, nondiscriminatory evaluation and placement, and due process."). In particular, commentators and the courts have discussed these relationships in areas such as minimum competency, *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179 (7th Cir. 1983), A. Rosewater, *Minimum Competency Testing Programs and Handicapped Students: Perspectives on Policy and Practice* 5 (1979) ("One set of criteria for determining the appropriateness of minimum competency programs for use with handicapped students may be drawn from . . . P.L. 94-142 and Section 504."); discipline, *S-1 v. Turlington*, 635 F.2d 342, and Note, *The Rights of Handicapped Students in Disciplinary Proceedings by Public School Authorities*, 51 Colo. L. Rev. 367 (1981); and non-discriminatory assessments, *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), and K. Heller, K. Holtzman, and S. Messick, *Placing Children in Special Education: A Strategy for Equity* 3 (1982) ("Both Section 504 . . . and the Education for All Handicapped Children Act . . . require the formal identification of children with handicapping conditions.").

cally made applicable to educational services, Congress clearly would have spelled out any limiting effect it intended for Section 504. If the EAHCA were meant to preempt Section 504 rights and remedies, the result would be both illogical and inequitable—handicapped children in states participating in the EAHCA would forfeit specific rights conferred by the Equal Protection Clause. U.S. Const. amend. xiv, § 5. If this were the case, handicapped children in New Mexico, a state which elects not to participate in the EAHCA, would have no right to receive an appropriate education. Yet that is not the case. *NMARC v. New Mexico*, 678 F.2d at 855 (10th Cir. 1982).

The EAHCA was *not* enacted to limit Section 504, but to complement it. As Senator Randolph observed:

> We can look back over the past few years and see that progress has been made in meeting our responsibility to these handicapped children; however, we should not complacently assume that enough has been done for these children to assure their right to a free appropriate public education.[16]

121 Cong. Rec. 19,482 (1975). It is clear that the First Circuit's holding that the EAHCA limits the rights af-

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[16] In two recent decisions, this Court has apparently concurred with the view that Section 504 and the EAHCA reinforce each other. In *Pennhurst State School v. Halderman*, 451 U.S. 1, 31 (1981), the Court refers to the EAHCA and Section 504 to support the statement, "Congress in recent years has enacted several laws designed to improve the way in which this Nation treats the mentally retarded." Last year, in *Bd. of Educ. v. Rowley*, 458 U.S. at 179, the Court described the EAHCA as a funding statute that, "provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures." The Court emphasized that the EAHCA was one of a series of legislative efforts by Congress since 1966 to provide educational opportunities for the handicapped. *Id.*

forded by the Rehabilitation Act is contrary to the language of the statutes and the intent of Congress.

## III. SECTION 505 PROVIDES FOR FEES TO PREVAILING PARTIES IN AN ACTION TO COMPEL THE PROVISION OF A FREE APPROPRIATE EDUCATION.

A prevailing party under Section 504 is entitled to attorney's fees which are provided for in Section 505(b), 29 U.S.C. § 794a(b) (Supp. V 1980):

> In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorney's fee as part of the cost.

The Court of Appeals did not suggest that petitioners failed to raise a substantial claim under Section 504. *Maher v. Gagne*, 448 U.S. 122 (1980). Since the intent of Congress was to interpret Section 505 consistently with Section 1988, 124 Cong. Rec. 30,364-7 (1978) (Remarks of Senator Cranston), in order to prevail under Section 505, it is only necessary to raise a substantial Section 504 claim and to achieve some of the benefits sought through the litigation. *Hensley v. Eckerhart*, 103 S.Ct. 1933 (1983). As this Court has recognized, it is not necessary that there be an actual ruling or determination on the Section 504 claim, "as long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.'" *Maher v. Gagne*, 448 U.S. at 132 (1980). *See also*, H.R. Rep. No. 1558, 94th Cong., 2d Sess. 4, n.7 (1976).

Respondents' refusal to fund Tommy's special education placement would have totally excluded him from any and all federally-funded education solely on the basis of his status as a qualified handicapped individual. If Tommy had not been handicapped, or had a different handicap, he would have been allowed to participate in

and gain the benefits of an educational program.[17] However, since he was compelled to file suit in order to gain those rights, he clearly was a "prevailing party."

As the court in *Patsel* held, Section 505, "was enacted to benefit *all* handicapped individuals." 530 F. Supp. at 666. (emphasis added). Obviously, Section 505 could have been limited to cases that could *only* have been brought under the Rehabilitation Act if that had been the intent of Congress, "since both the EHA and Section 504 were already in existence, as were their coordinated and consistent regulations. It was not limited, however." *Id.*

The First Circuit, however, held that Section 505 did not apply because, as noted in the previous section, the relief that was obtained *could* have been afforded under the EAHCA,[18] and that, "the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that

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[17] In this case, there was discrimination between *different classes* of handicapped children. As the Rhode Island Supreme Court held, *Smith v. Cumberland School Committee*, —— R.I. ——, 415 A.2d 168, 173 (1980), that State's scheme for the provision of special education mandates respondents' responsibility for the provision of a free, appropriate special education to children with other handicapping conditions *without* allowing for the dilatory and misplaced attempt to shift responsibility to the Department of Mental Health, Retardation and Hospitals. For example, the State procedures for placing learning disabled children would not have required that the procedure herein be followed. Consequently, that type of handicapped child would not have been in danger of exclusion since there would have been no dispute over respondents' responsibility. *See, e.g., Turillo v. Tyson*, 535 F. Supp. 577 (D.R.I. 1982), and *Colin K. v. Schmidt*, 536 F. Supp. 1375 (D.R.I. 1982), *aff'd*, 715 F.2d 1 (1st Cir. 1983).

[18] No EAHCA adjudication was ever made below. As the First Circuit held in its unpublished decision on the appeal of the *merits* determination by the District Court, "the plaintiff has won as a matter of *state law*, all that he originally sought." *Smith v. Cumberland School Comm.*, Nos. 81-1454 and 81-1499, slip. op. at 2 (January 11, 1982).

properly limits the fees provision of the more general Rehabilitation Act." *Smith v. Cumberland School Committee*, 703 F.2d at 10.

The plain meaning of the language of Section 505 simply does not support the Court of Appeals' conclusion. Section 505 authorizes fees in *any* action or proceeding to enforce Section 504. There is no indication in the statute or its legislative history that "any" action or proceeding means "any" litigation *except* that which might possibly be pursued in combination with the EAHCA. The intent of Congress as evidenced in the legislative history of Section 505, directly refutes the holding of the Court of Appeals:

> [D]isabled individuals are one of the very few minority groups in this country who have not been authorized by the Congress to seek attorneys' fees. The amendment proposes to correct this omission and thereby assist handicapped individuals in securing the legal protection guaranteed them under title V of the act.

H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7332. That statement, coming three years after the enactment of the EAHCA and a year after the promulgation of specific regulations under Section 504, makes it clear that Section 505 applies to *all* handicapped individuals whether or not they happen to have similar rights under another statute. However, the Court of Appeals would seem to be holding that the 1975 EAHCA implicitly repealed the 1978 passage of Section 505. Obviously, given the chronology of the various developments in this field, this could not be.[19]

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[19] Apart from the timing of the passage of the statutes in question, the Court of Appeals' decision that Section 505 was implicitly repealed by the EAHCA "would surely do violence to the 'cardinal rule . . . that repeals by implication are not favored.' *Morton v. Mancari*, 417 U.S. 535, 549, *quoting Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)." *TVA v. Hill*, 437 U.S. 153, 189 (1978).

That the First Circuit misinterpreted the relationship between the EAHCA and Section 504 is further demonstrated by the 1978 amendments to Section 504. By 1978, there had been the promulgation of the HEW regulations which Congress had examined and codified, *see* S. Rep. No. 890, *supra*, and decisions holding that Section 504 guaranteed an appropriate education, *Howard S. v. Friendswood Independent School District*, 454 F. Supp. 634, and *Hairston v. Drosick*, 423 F. Supp. 180.

Preemption should not be lightly implied. What the Court of Appeals attempted to avoid in misconstruing the statute, is precisely what Congress sought to ensure —that certain programs (in this context, many elementary and secondary schools and other education programs) would be governed by the requirements of *both* the EAHCA and Section 504. *Helms v. McDaniel*, 657 F.2d 800, *rehearing denied*, 664 F.2d 291 (5th Cir. 1981), *cert. denied*, 455 U.S. 946 (1982), and *S-1 v. Turlington*, 635 F.2d 342 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

In this instance, the timing of events is of utmost importance. Congress passed Section 505 the year after the promulgation of the regulations under Section 504. Congress demonstrated its approval of the regulations by codifying them. *Jones v. MARTA*, 681 F.2d at 1382. As the court in *Patsel* observed:

> In some cases, then, Section 504 rights may be vindicated by obtaining compliance with EHA procedures even if the EHA is not applicable. . . . No indication has been found that the EHA alone must be applied to cases in which the EHA is applicable, i.e., that the two were mutually exclusive . . . close inspection of the attorneys' fees provision itself is in order. The plain language of Section 505 of the 1978 Amendment of the Rehabilitation Act allows the court to award fees '[i]n any action or proceeding to

> enforc or charge a violation of this subchapter.' 29 U.S.C. § 794a(b). It does not state that fees should not be awarded if the action or proceeding is one which happens to involve rights in addition to those secured by a provision of the Rehabilitation Act. In other words, Section 505 is not explicitly limited to actions which can be brought *only* under a Rehabilitation Act provision, such as Section 504, and no other, such as the EHA. The statute could have been so limited, if that were the intent, since both the EHA and Section 504 were already in existence, as were their coordinated and consistent regulations. It was not limited . . . In light of such express intent to aid *all* handicapped children seeking an appropriate placement this court cannot construe Section 505 as inapplicable merely because a parallel claim was successfully brought under the EHA.

*Patsel v. D.C. Bd. of Educ.*, 530 F. Supp. at 665-666 (emphasis in the original).

In sum, there is nothing in Section 504, Section 505 or the EAHCA to suggest that Congress intended to limit the substantial rights provided in the first two by passing the latter.[20]

## IV. CONGRESS SOUGHT TO ENSURE THE RIGHTS OF HANDICAPPED CHILDREN BY ESTABLISHING A SYSTEM OF FEE SHIFTING.

In passing the EAHCA and amending Section 504, Congress sought to ensure that handicapped children's

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[20] Many commentators have disgreed with the First Circuit's position that there was no basis for any fee award here. *E.g.*, Bodensteiner, *Availability of Attorney Fees in Suits to Enforce the Educational Rights of Children with Handicaps*, 5 W. New Eng. L. Rev. 391 (1983) and Hyatt, *Litigating the Rights of Handicapped Children to An Appropriate Education: Procedures and Remedies*, 29 U.C.L.A. L. Rev. 1 (1981). In addition, the Fifth Circuit has recently "reject[ed]" the First Circuit's reasoning at issue here. *Espino v. Besteiro*, 708 F.2d 1002, 1009 (5th Cir. 1983).

rights to special education would be protected.[21] Fee-shifting ensures that this may, in fact, happen.

"The availability of attorney fees can be a significant practical factor affecting whether aggrieved handicapped students are able to assert their education rights." C. Citron, *The Rights of Handicapped Students* 53 (1982). Section 504, as with other civil rights acts, "depend[s] heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976). By providing for fee awards in Section 505, Congress sought to promote the effective representation of handicapped persons alleging discrimination.

This goal matches the expectations of those most concerned with protection of these rights that "adequate legal representation for handicapped persons" is a necessity. The White House Conference on Handicapped Individuals, 2 *Final Report* 282 (1977). "Many legal cases are not filed in court because plaintiffs are poor or are enured to discriminating [sic] treatment. Many lawyers shy away from the litigation because the law is unclear, the legal standards are obscure, and the expense is great." Schroeder, *The Law Speaks—Disability and Le-*

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[21] Passage of the EAHCA and Section 504 has not completely rectified the problem. As of September, 1982, the Department of Education discovered that 22,610 "children identified as handicapped [were] receiving no education whatever. Another 31,976 are in some school programs but are not receiving special education services they have been identified as needing. Some 192,499 are awaiting evaluations." United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities*, 28 n. 77 (1983). "These figures do not account for children school authorities have not yet identified as handicapped. Moreover, the numbers quoted are probably significantly underestimated; they are projected estimates based upon *self-reported* numbers supplied by school districts." *Id.* (emphasis in the original.)

similar results. A study of seventy-one hearing cases in *gal Practice* in *Disabled People as Second Class Citizens* 85 (M. Eisenberg, C. Griggins, and R. Duval eds. 1982).

The primary protection for handicapped children under Section 504 and the EAHCA is the due process hearing.[22] 20 U.S.C. § 1415 (1981), 34 C.F.R. § 104.36 (1982). As this Court has recognized in *Bd. of Ed. v. Rowley*, 458 U.S. at 205, "the importance Congress attached to these procedural safeguards cannot be gainsaid." However, for the due process system to function effectively, there must be a reason for the LEA's and SEA's to follow determinations rendered in the hearings. *See, e.g., Jacobsen v. District of Columbia Board of Education*, 564 F. Supp. 166 (D.D.C. 1983) (school district failed to obey determination that proposed placement was inappropriate and refused to maintain current placement), and *Patsel v. District of Columbia Board of Education*, 522 F. Supp. 535 (D.D.C. 1982) (school district refused to hold due process hearing on denial of change of placement). *See also, Hastings v. Maine-Endwell Central School District*, 676 F.2d 893. An effective method of ensuring that each individual receives his or her due process is to allow for attorney's fees in ensuing litigation. In this way, school districts will be more likely to obey the determinations of hearing officers and less likely to force parents and children to file suit to enforce determinations, thus protecting the children and conserving scarce judicial resources.

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[22] It should be noted that, for the 1979-80 school year, there were only 2,584 due process hearings in the United States. United States Department of Education, Special Education Programs, *Fourth Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act* 45 (1982). Of this number, 1,166 were hearings conducted by local education agencies ("LEA") and 1,418 were conducted by state education agencies ("SEA"). *Id.* It is unclear exactly how many children were involved in these hearings. Eight of the states provide only for SEA level hearings. *Id.* at 41.

Experience in the District of Columbia has demonstrated that fee awards are typically at a level which balances their deterrent value against the need to allocate these limited resources for education. In a total of thirteen cases the highest fee award was $9638.00, the lowest, $1260.00, and the mean, $3940.[23]

Congress has determined that allowing fees to prevailing plaintiffs has a deterrent value since "it gives defendants strong incentives to avoid arguable civil rights violations and to make concessions in hopes of an early settlement." *Hensley v. Eckerhart*, 103 S.Ct. at 1944-45 n.2 (Brennan, J., concurring in part and dissenting

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[23] The cases in the District of Columbia and the amount of the awards are as follows:

*Intrator v. District of Columbia Bd. of Educ.*, C.A. No. 82-1204 (July 19, 1982) $2746.80

*Murray v. District of Columbia Bd. of Educ.*, C.A. No. 80-2645 (July 19, 1982) $3560.00

*Foster v. District of Columbia Bd. of Educ.*, C.A. No. 82-095 (June 25, 1982) $2836.03

*Capello v. District of Columbia Bd. of Educ.*, C.A. No. 79-1006, *on appeal*, U.S. App. No. 82-1702 (June 9, 1982) $8424.00

*Means v. District of Columbia Bd. of Educ.*, C.A. No. 78-2402 (March 31, 1982) $9638.00

*Johnson v. District of Columbia Bd. of Educ.*, C.A. No. 80-897, *on appeal*, U.S. App. No. 82-1209 (January 29, 1982) $3491.00

*Fells v. District of Columbia Bd. of Educ.*, C.A. No. 81-821 (January 29, 1982) $1290.00

*Small v. District of Columbia Bd. of Educ.*, C.A. No. 82-864 (January 29, 1982) $3650.05

*Warren v. District of Columbia Bd. of Educ.*, C.A. No. 80-1841 (January 28, 1982) $4218.00

*Patsel v. District of Columbia Bd. of Educ.*, 530 F. Supp. 660 (January 21, 1982) $2860.00

*Davis v. District of Columbia Bd. of Educ.*, 530 F. Supp. 1212 (January 21, 1982) $5921.00

*Harris v. District of Columbia Bd. of Educ.*, C.A. No. 81-1842 (December 18, 1981) $2117.79

*Fells v. Brooks*, 522 F. Supp. 30 (March 9, 1981) $1260.00.

in part) (citations omitted). A possible award of attorney's fees has the salutory effect of providing "assurance that agents of the State will not deliberately ignore due process rights." *Carey v. Piphus*, 435 U.S. 247, 257 n.11 (1978).[24] This is particularly true when Congress has determined that the rights of handicapped children need special protections. *See* 20 U.S.C. §§ 1400(b)(9) and (c) (1981) ("it is in the national interest that the Federal Government assist State and local efforts . . . to meet the educational needs of handicapped children in order to assure equal protection" and "[i]t is the purpose of this chapter to assure that all handicapped children have available to them . . . a free appropriate education.")

Not only did Congress allow for fees as one way of promoting the involvement of lawyers in protecting the rights of handicapped children, but in addition, allowing fees in a sense "evens the odds." "Parents and advocacy groups have complained that the school or agency has an unfair advantage in the hearing process. The area of legal counsel is one such area upon which complaints are based. Simply stated, the parents feel their tax dollars are actually supporting competent counsel for the other party." P. Jones, *A Practical Guide to Federal Special Education Law* 94 (1981).[25] Congress sought in the

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[24] While the EAHCA, 20 U.S.C. § 1416(a) (1981), and Section 504, 34 C.F.R. § 104.61 (1982), have provisions allowing the Department to withhold funds to LEA's and SEA's that violate these Acts, that sanction works to the detriment of handicapped children by denying all an education. Thus, the magnitude of the sanction undercuts its effectiveness.

[25] As Budoff and Orenstein found, many parents need support to cope with the traumas associated with the due process procedures and attendant litigation. "It's really very rough and frustrating, and you feel like an idiot at times." "It's been hell. Absolute hell. I very seldom speak about it, even to my husband, because I find that it gets me very upset. And once I start thinking about it, I get the feeling that I become very obcessed [sic] by it and that's all I

grant of fees to reduce the schools' and agencies' "overall advantage." *Id.* at 95.

Providing fees will protect the child's right to litigate, but will also encourage the due process system to function more effectively. This system was designed by Congress and the Department to resolve disputes quickly and without litigation. *Bd. of Educ. v. Rowley*, 458 U.S. at 206. Involvement of counsel will help accomplish this.

Recent research has demonstrated that the efficiency of the process increases with involvement of attorneys. In Pennsylvania, children and their families who were represented by counsel were found to have a much greater chance of success in due process hearings and, consequently, vindicating the rights this system of laws was designed to protect. The earliest empirical evidence of this difference in result was discovered in research on the implementation of the *PARC* decree. "Parents represented by counsel were significantly more likely to win a favorable ruling." Kirp, Buss, and Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals*, 62 Cal. L. Rev. 40, 78 (1974). Research on the implementation of Chapter 766 in Massachusetts, Mass. Gen. Laws Ann. ch. 71B (West 1981), (a state statute used as one of the models for the due process procedures in the EAHCA and Section 504), shows

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can think about. My husband spent hours and hours with the papers, stacks and stacks of papers, for nearly two years." M. Budoff and A. Orenstein, *Due Process in Special Education* 115 (1982) "As might be expected from their description of hearings, many parents felt they were 'beaten' by an adept attorney for the school. 'The only time they do rule for the children is when it's a very obvious case of negligence . . . . It seems that those are the only ones who win, unless you have a lawyer.'" *Id.* at 136. "The involvement of lawyers in special education hearings is increasing, and this is probably both useful and inevitable." "Most parents probably require some sort of representation to help them organize their materials into a coherent and reasoned presentation." *Id.* at 234.

Massachusetts discovered that parents' representation by counsel was the factor which most influenced the outcome of the hearing. M. Budoff and A. Orenstein, *Due Process in Special Education* 229 (1982).[26]

In this instance, the First Circuit's denial of attorney's fees defeats two congressional priorities: the mainstreaming of handicapped children into American society expressed in Section 504 and the EAHCA, and the private enforcement of civil rights statutes expressed in §§ 1988 and 505. (42 U.S.C. § 1988 (Supp. V 1980). While the First Circuit's decision has been shown to be against the weight of authority, more importantly, if allowed to stand, it effectively denies handicapped children their only protection in the area which is most fundamental to them—education.

Therefore, *amicus* ACLD urges that this Court reverse the First Circuit's decision and award attorney's fees for this litigation.

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[26] A study of California state appeal hearings shows similar results. When the parent was represented, the family "won" eighteen and "lost" seven; without counsel the family "won" eight and "lost" ten. M. Kirst and K. Bertken, *Due Process Hearings in Special Education: Some Early Findings from California* in *Special Education Policies* 167 n.33 (J. Chambers and W. Hartman eds. 1983). While the data are less than complete, the trend seems clear. The presence of counsel at the due process hearing significantly aids the protection of the handicapped child's rights.

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals and award attorney's fees to petitioners.

Respectfully submitted,

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In The

# Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS F. SMITH, JR., et. al., *Petitioners,*

v.

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al., *Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## BRIEF OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether plaintiffs who are granted relief afforded by the Education of All Handicapped Children Act, 20 U.S.C. §§ 1401 *et. seq.*, are entitled to an award of attorneys fees under the Rehabilitation Act of 1973, as amended, where the plaintiffs could not have prevailed on the Rehabilitation Act claim alleged.

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## OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit is reported at 703 F.2d 4 and is attached to the Petition for Certiorari as Appendix A. That decision reversed the order of the United States District Court for the District of Rhode Island awarding attorneys' fees. That order is unreported; a copy is attached to the Petition for Certiorari as Appendix B.

## JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 24, 1983 (Appendix A, at A-1, attached to the Petition for Certiorari). The jurisdiction of this Court was invoked by petitioners under 28 U.S.C. §1254(1).

## INTEREST OF THE AMICUS CURIAE

The District of Columbia, by and through the Corporation Counsel, respectfully presents this brief as *amicus curiae*, in support of respondents in this case.

This Court made it clear, in *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176, 202-208 (1982), that state and local educational agencies, under the EAHCA, have special competence to deal with special education within established administrative procedures. In light of its experience with the EAHCA, the District of Columbia believes that the provision of fees for EAHCA claims, as opposed to Rehabilitation Act claims for discrimination under §504, would foster a disregard for the administrative process established under the EAHCA. That has in fact occurred in the District of Columbia.[1] Thus, the District of Columbia has a substantial interest in this matter.

In its brief, the District of Columbia has limited its discussion to the validity of petitioners' claim for attorneys' fees under the Rehabilitation Act. Neither of the courts below focused on the attorneys' fee claim under the Rehabilitation

[1] See e.g., *Johnson* v. *District of Columbia Bd. of Ed.*, U.S. App. No. 82-1209 (D.C. Cir., argued January 26, 1983). There the plaintiff refused to enroll her child in a proposed placement at a special education learning center and requested an administrative review of her child's education program. On the eve of the administrative hearing, however, the plaintiff withdrew her request for an administrative review because she had in the meantime persuaded the Superior Court of the District of Columbia, in a delinquency proceeding, to place her child at a residential facility chosen by her. The District of Columbia Court of Appeals stayed the Superior Court's order and ultimately reversed it. *In the Matter of J.J.*, 431 A.2d 587 (D.C. 1981). Instead of returning to the administrative process, plaintiffs then filed suit in the United States District Court and obtained a preliminary injunction directing the Board of Education to finance the private placement. Almost 2 years later, the district court, without ever deciding the merits of any claim, awarded attorney's fees as its "final" order in the case.

The *Johnson* case is by no means the only case in which counsel has attempted to bypass the administrative process in favor of the courts, apparently in part because of the opportunity to recover fees.

Act. Thus, the Circuit merely incorporated its discussion of 42 U.S.C. §1988 in ruling on the availability of attorneys' fees under the Rehabilitation Act. However, the briefs filed by *amici curiae* have focused on the availability of fees under the Rehabilitation Act, and all of the District's pending litigation regarding attorneys' fees involves awards of attorneys' fees under the Rehabilitation Act rather than 42 U.S.C. §1988. Accordingly, the District of Columbia has a substantial and continuing interest in the entitlement to attorneys' fees under the Rehabilitation Act for EAHCA claims.

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## STATUTES INVOLVED

Section 504 of the Rehabilitation Act, 29 U.S.C. §794, provides, in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Section 505(b) of the Rehabilitation Act, 29 U.S.C. §794a(b), which was added to the Rehabilitation Act through amendments enacted in 1978, provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

## STATEMENT OF THE CASE

Petitioners seek reversal of the First Circuit's decision denying them any attorneys fees under either the Civil Rights Attorney's Fees Awards Act., 42 U.S.C. §1988, or the Rehabilitation Act., 29 U.S.C. §794a(b). The undisputed facts pertinent to the Rehabilitation Act issue are as follows.

Petitioner, Thomas Smith, is a physically and emotionally handicapped child. He "has a long history of being unable to fit into the educational environment provided for him * * * [, and] walks with the aid of leg braces and crutches due to problems created by cerebral palsy * * *." J.A. 33. In December 1975, he was enrolled in the Day Hospital Program at Emma Pendleton Bradley Hospital, a private facility. J.A. 33.[2] For almost a year tuition was partially funded by the Cumberland School Committee until, in November 1976, the superintendent of schools informed petitioners that the Department of Mental Health, Retardation and Hospitals (MHRH), rather than the school committee, was responsible for funding the placement at that private facility. J.A. 130. As a result it was likely that, because of MHRH's limited funds, Thomas would have to go onto a waiting list before his placement could be funded. This decision was upheld by the school committee and by the associate commissioner of education. J.A. 131. The associate commissioner, however, held that the school committee did have to "contribute * * * the 'per pupil cost' as its share of the services provided to Thomas." *Id.*; *Smith* v. *Cumberland Sch. Committee*, 415 A.2d 168, 171 (R.I. 1980).

Petitioners sought relief in the local Family Court and, when their petition was dismissed, in Superior Court. That

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[2]The annual tuition was $18,000 (J.A. 130), or double the per pupil cost for educating other children. J.A. 68. There is no dispute that the facility was providing Thomas with an "appropriate education", and that regular programs in the Cumberland school system in the school district, where he and his parents resided, could not meet his educational needs.

action was also dismissed. Thus, on November 26, 1976, petitioners brought suit in the United States District Court for the District of Rhode Island seeking an order compelling the school committee to continue funding Thomas' special education at Bradley Hospital. J.A. 132. In their first amended complaint, petitioners argued that the school committee's actions violated the fourteenth amendment to the Constitution of the United States and the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§1401 *et seq.* J.A. 49-64.

On December 28, 1978, the district court certified to the Rhode Island Supreme Court the question regarding whether the school committee or the MHRH was responsible for funding Thomas' education at Bradley Hospital. J.A. 108-123. In its June 3, 1980 decision, the Rhode Island Supreme Court noted that, under state law,[3] "a school committee has an affirmative obligation to provide the type of special education that will best satisfy the needs of a resident handicapped child whose * * * handicap prevent his normal educational growth and development." J.A. 133-134; *Smith* v. *Cumberland Sch. Committee, supra* 415 A.2d at 171-172. The court further construed §16-24-1 as providing for the responsibilities of the Rhode Island Board of Regents for Education under the EAHCA. The court then reviewed the different and complementary obligations of the school committee, the Board of Regents and the MHRH, and held that (1), in the first instance, the school committee is "obligated to finance a handicapped child's special education in a private program" and (2) MHRH's obligation "arises when the services that the school committee must provide are no longer accessible to an emotionally disturbed child as a consequence of the 'psychiatric care and treatment' he is receiving in the MHRH program." J.A. 142-143; 415 A.2d at 174. That is, if the MHRH program of treatment

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[3] R.I.G.L. S. §16-24-1.

precludes a child from participating in the newly established public program created, or private program utilized, by the school committee for the child, then the MHRH must educate the child. Thus, the MHRH does not have the responsibility of educating all emotionally handicapped children, but, the Rhode Island Supreme Court said, under state law, the school committee had that obligation with respect to Thomas and that was consistent with its responsibilities under the EAHCA.

Three months after the Rhode Island Supreme Court resolved the issue on which petitioners had originally filed suit in federal court—namely, which agency should pay for Thomas' special education—on September 16, 1980, petitioners filed a second amended and supplemental complaint. J.A. 152. In that pleading, petitioners for the first time alleged that the school committee had violated §504 of the Rehabilitation Act, 29 U.S.C. §794. J.A. 165. In support of that allegation, petitioners asserted that the school committee had discriminated against Thomas in contrast to other handicapped children, on the basis of his emotional handicap, when, solely on the basis of fiscal considerations, it "misinterpret[ed] * * * Rhode Island and federal law" and decided that the MHRH had the responsibility for educating Thomas. J.A. 166-167. Petitioners sought permanent injunctive relief.[4]

In its memorandum and order of June 4, 1981 denying respondents' motion to dismiss, the district court found it unnecessary to decide whether petitioners had a cause of action under §504 of the Rehabilitation Act. J.A. 178.[5] The court held that, on the basis of its earlier January 17, 1977 opinion, petitioners had a cause of action under §42 U.S.C. §1983. J.A. 178-179. The court concluded that petitioners

[4]Petitioners did not seek attorneys' fees under §505(b) of the Rehabilitation Act, 29 U.S.C. §794a(b), but only under 42 U.S.C. §1988. J.A. 168.

[5]The district court later stated that the §504 claim, filed after the Rhode Island Supreme Court decision, had become moot by that decision. A. 34.

were entitled to a permanent injunction on the basis of the decision of the Rhode Island Supreme Court. A. 5, 29. The First Circuit affirmed. A. 5, 29-30; J.A. 172.

Petitioners then sought attorneys' fees. The district court held that petitioners were entitled to attorneys' fees on their §1983 claim for the administrative proceedings held under the EAHCA[6] and the judicial proceedings which resolved petitioners' state law claim. A. 40-41. The First Circuit reversed the award of attorneys' fees. *Smith* v. *Cumberland School Committee*, 703 F.2d 4 (1st Cir. 1983).

As to the Rehabilitation Act, the First Circuit, while expressing doubt that a private action under §504 existed, did not decide that issue, but nevertheless held that attorneys' fees were unavailable under 29 U.S.C. §794a(b). The First Circuit did not decide whether petitioners had a substantial claim under §504, but concluded that, for the same reasons fees could not be awarded under 42 U.S.C. §1988, they could not be awarded under 29 U.S.C. §794a(b): The comprehensive remedial scheme under the EAHCA precludes reference to the general prohibition of §504 of the Rehabilitation Act, 29 U.S.C. §794.

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## SUMMARY OF ARGUMENT

Petitioners in this case sought and obtained from a local school district funds to pay for the education of an emotionally and physically handicapped child, who could not receive an appropriate education in the school district's own facilities, at an expensive private educational institution. They seek attorneys' fees under the authority of, *inter alia*, the Rehabilitation Act, 29 U.S.C. §§794 *et seq.*, which, in §504, prohibits discrimination against handicapped indi-

[6] While the proceedings were pending in the district court, and after petitioners amended their complaint to include an EAHCA claim, petitioners were ordered to exhaust their EAHCA administrative remedies. J.A. 30-48.

viduals. They are not entitled to fees under the Rehabilitation Act, however, since it is clear that they had no §504 claim.

Petitioners obtained relief under state law, and both courts below treated them as though they had prevailed under the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§1401 *et seq.* The EAHCA, however, does not authorize awards of attorneys fees. The Rehabilitation Act does authorize such fee awards; however, petitioners did not obtain a ruling in their favor under §504.

A party who sought relief under both the Rehabilitation Act and under another statute which does not authorize fees, and has prevailed under the non-fee statute, is entitled to attorneys' fees under the Rehabilitation Act only if it is clear that he would have prevailed under his §504 claim. The attorneys fee provision of the Rehabilitation Act is modeled on the Civil Rights Attorney's Fee Award Act of 1976, 90 Stat. 2641 (1976), codified in 42 U.S.C. §1988. The legislative history of §1988 shows that Congress intended that, where a party prevailed on a non-fee statute, he could obtain fees under §1988 only where there was a favorable "determination on the other [fee] claim for the purpose of awarding counsel fees". H.R. Rep. No. 1588, 94th Cong., 2d Sess. (1976) at 4, n.7. Furthermore, the rationale of *Maher* v. *Gagne*, 448 U.S. 122 (1980) does not apply where no constitutional claim is involved. *Maher* permits recovery of attorneys' fee under §1988 where a party has prevailed under a non-fee statute if that party had a "substantial" constitutional claim for which fees could be awarded under §1988. However, *Maher's* ruling that only a "substantial" constitutional claim need be shown is based on the policy of avoiding unnecessary constitutional rulings, a policy which has no application in a purely statutory context. Therefore, the relevant legislative history shows that fees are awardable under the Rehabilitation Act only when it is clear that a party would have prevailed on his or her §504 claim and there are no policy considerations to the contrary.

Petitioners here, however, could not even show that they had a "substantial" claim under §504. For, their claim was clearly precluded by *Southeastern Community College* v. *Davis*, 422 U.S. 397 (1979). That case holds that §504 does not require educational institutions to make substantial modifications to their existing programs to accommodate a handicapped person. The school district here could not accommodate the child in question in its existing programs; it could obtain an appropriate education for him only by funding his education in a special private facility at a cost of $18,000 per year. To require the school system to do so would require it to create a private supplement to its existing system at substantial cost. That constitutes a "substantial modification" within the clear meaning of *Southeastern Community College*, *supra*.

That conclusion is buttressed by the reasoning in *Southeastern Community College* that §504 is not an affirmative action statute. Petitioners' argument—essentially that the needs of the child in question here must be accommodated at whatever cost—unquestionably invokes affirmative action principles, which *Southeastern Community College* makes clear do not inhere in §504. Indeed, it is not even clear that the EAHCA requires quite the sort of affirmative action for which petitioners contend. See *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176 (1982).

Petitioners have attempted to avoid the impact of *Southeastern Community College*, *supra*, by arguing, *inter alia*, that the policy involved here was discriminatory because it treated the child in question here less advantageously than other handicapped children. They also argue that the policy in question here violates the Equal Protection Clause and therefore must violate §504. However, *Rowley* disposes of both arguments. It rejects that notion that all handicapped individuals must be treated the same. It also rejects the notion that the Equal Protection Clause requires absolute equality of educational opportunity regardless of cost.

Since petitioners clearly had no §504 claim, they were not entitled to attorneys' fees under the Rehabilitation Act.

## ARGUMENT

### A. INTRODUCTION

This Court has made it quite clear that, except in limited circumstances not present here, attorneys' fees are awardable to a prevailing plaintiff only where expressly provided for by statute. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). See also *Hensley* v. *Eckerhart*, ——U.S. ——, ——, 103 S. Ct. 1933, 1937 (1983). Attorneys' fees are not available merely because providing them serves important policies, or even where providing them would serve policies similar to those also served by statutes which expressly provide for the award of attorneys' fees. Thus, in *Alyeska*, *supra* 421 U.S. at 270, n.46, the Court specifically disapproved of cases which had awarded attorneys' fees on such theories. E.g., *Morales* v. *Haines*, 486 F.2d 880 (7th Cir. 1973); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). The principles recognized in *Alyeska* are critical here because, while petitioners' amended complaints alleged violations of both the Rehabilitation Act and the EAHCA, only one of those statutes, namely the Rehabilitation Act, provides attorneys' fees.[7] And, as we show below,

[7] We do not address in this brief petitioners' §1988 claim although we believe that there is adequate support in the decisions of this Court, and other courts, for the First Circuit's ruling regarding the nonavailability of attorneys' fees under 42 U.S.C. §1988. See e.g. *Guardians Ass'n* v. *Civ. Serv. Com'n of City of N.Y.*, —— U.S. ——, ——, n.3, 103 S. Ct. 3221, 3236, n.3 (1983) (Powell, J., concurring); *Middlesex County Sewage Authority* v. *National Sea Clammers Ass'n.*, 453 U.S. 1, 20-21 (1981); *Hawaii Dept. of Education* v. *Katherine D.*, —— F.2d —— (9th Cir., filed November 7, 1983) *Timms* v. *Metropolitan Sch. Dist., of Wabash City*, 718 F.2d 212, 217 (7th Cir. 1983); *Quackenbush* v. *Johnson City School Dist.*, 716 F.2d 141, 150-152 (2d Cir. 1983) (Weis, J., dissenting); *Colin K. by John K.* v. *Schmidt*, 715 F.2d 1, 8-10 (1st Cir. 1983).

We assume, unless this Court should decide otherwise in *Consolidated Rail Corporation* v. *Darrone*, U.S. No. 82-862 (argued November 29, 1983), that there exists a private cause of action under §504 of the Rehabilitation Act.

the relief obtained here could not properly be granted under the Rehabilitation Act. Thus, the First Circuit was correct when it held that petitioners could not obtain attorneys' fees under the Rehabilitation Act.* In light of the Court's decisions in *Hendrick Hudson Dist. Bd. of Ed.* v. *Rowley*, 458 U.S. 176 (1982) and *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), it is plain that, while respondents conduct here may not have met their responsibilities under the EAHCA, it clearly did not violate the Rehabilitation Act.

### B. The Relationship Between Rehabilitation Act And EAHCA

The Rehabilitation Act was enacted in 1973. Pub. L. 93-112, 87 Stat. 394, 1973 U.S. Code Cong. and Adm. News, p. 2076. Pursuant to §504 of the Act, discrimination on the basis of handicap is prohibited in federally funded programs. Thus, §504 provides that

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *. [29 U.S.C. 794]

Subsequently, as a result of a District Court order in *Cherry* v. *Mathews*, 419 F.Supp. 922 (D.D.C. 1976), the then-United

*Petitioners and *amici* argue that a substantial §504 claim was presented below and thus they were entitled to attorneys' fees. The First Circuit did not resolve that issue nor did it assume that a substantial claim existed. Instead, it held that no attorneys' fees could be awarded because the EAHCA provided the exclusive avenue of relief for petitioners in any proceeding in which a child is seeking a "free and appropriate education." This Court need not decide whether the EAHCA provides the exclusive avenue of relief because, as we show below, petitioners could not obtain attorneys' fees under the Rehabilitation Act. This is because (1) they could not prevail on their §504 claim and (2) they did not even present a substantial §504 claim. See *infra* at 16-22.

States Department of Health, Education and Welfare promulgated regulations that provided for an administrative mechanism to enforce §504. See 42 Federal Register 22677 (May 4, 1977).

Congress enacted the EAHCA in 1975. Pub L. 94-142, 89 Stat. 775, 1975 U.S. Code Cong. and Adm. News, P. 1425, codified at 20 U.S.C. §§1401 *et seq.* (1976). The EAHCA was enacted as result of District Court decisions—see *Mills* v. *Board of Education of District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972); *PARC* v. *Commonwealth of Pennsylvania*, 334 F.Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F.Supp. 279 (E.D. Pa. 1972)—recognizing the right of handicapped children to receive the benefits of a public education. See Note, *Enforcing the Right to An "Appropriate Education: the Education for All Handicapped Chidren Act of 1975*, 92 Harv. L. Rev. 1103 (1979).[9] The EAHCA narrowly focused on education. Moreover, it is a statutory mechanism for providing substantial amounts of federal money to states to assist them and local educational agencies in furnishing educational services to handicapped children. 20 U.S.C. §1411. However, such assistance is conditioned by a requirement that each state ensure that all handicapped children are provided with a free appropriate public education designed to meet their "unique needs". 20 U.S.C. §§1401(16)(17)(18) and (19) and 1412(1). This Court in *Rowley*, *supra* 458 U.S. at 198, stated that states are not required to provide 'equal' educational opportunities [since that] would * * * present an entirely unworkable standard requiring impossible measurements and comparisons." Rather, in providing access to public education, Congress merely in-

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[9] Although the Rehabilitation Act had been passed two years earlier, "[i]n explaining the need for federal legislation [namely, the EAHCA], the House Report noted that 'no congressional legislation has required a precise guarantee for handicapped children'" to equal access to a public education. *Rowley*, *supra* 458 U.S. at 200, quoting H.R. Rep. No. 94-332, 94th. Cong., 1st Sess. (1975) at 14.

tended that the education provided "be sufficient to confer some educational benefit." *Id.* at 200.[10]

The EAHCA also establishes procedures to ensure that a free appropriate education is provided each handicapped child which are intended to encourage resolution of a disputes at the local level. In outline,

> Parents are given the right to be involved in the initial determination of an individualized educational program for their handicapped child. 20 U.S.C. §1415(b)(1)(A). The school system must give the parents prior notice of any change in the child's educational placement, 20 U.S.C. §1415(b)(1)(C), and must be given an opportunity to present complaints to the school authorities. 20 U.S.C. §1415(b)(1)(E). If the parents are not satisfied with the school's response, they are entitled to a due process hearing before an impartial hearing officer. 20 U.S.C. §1415(b)(2). If the hearing is held by the local educational agency or an intermediate educational unit, the aggrieved party may appeal to the State educational agency. 20 U.S.C. §1415(c). After a decision by the State agency, an aggrieved party may bring an action in federal district court. 20 U.S.C. §1415(e)(2). These procedures are elaborated in regulations, 45 C.F.R. Part 121a, required by statute. 20 U.S.C. §1417(b).
>
> The States are also commanded to file plans detailing their compliance with the EAHCA, 20 U.S.C. §1413, and the Commissioner of Education must find that the plans comply with the statute. 20 U.S.C. §1412. If a State fails to comply, the Commissioner is authorized to withhold federal funds from the State educational agency. 20 U.S.C. §1416. The State may bring an action challenging this decision in the court of appeals for the circuit in which the State is located. 29 U.S.C. §1416(b).

[10] In the District of Columbia, providing access to a public education for handicapped children in need of a private placement entails a considerable expenditure of funds. Thus, in 1980, 240-260 handicapped children were provided services in private residential settings. The average cost of providing such services for a student for one year was $20,392.05. The maximum cost for providing educational services in the

[Footnote continued on next page]

*Turillo* v. *Tyson*, 535 F.Supp. 577, 581 (D.R.I. 1982). These procedures must be exhausted prior to filing an action under the EAHCA in district court, unless recourse to them would be futile. See *Riley* v. *Ambach*, 668 F.2d 635 (2d Cir. 1981). As indicated, the EAHCA does not provide for attorney's fees awards to prevailing parties. *Hymes* v. *Hartnett County Board of Education*, 664 F.2d 410, 412 (4th Cir. 1981).

After the enactment of the EAHCA in 1975, in response to the decision in *Cherry* v. *Mathews*, *supra*, HEW promulgated regulations to effectuate the provisions of the Rehabilitation Act. At the time that the Rehabilitation Act regulations were in their "final stages of preparation", EAHCA regulations were also prepared. See *Patsel* v. *District of Columbia Bd. of Ed.*, 530 F.Supp. 664 (D.D C. 1982). HEW attempted to make the two sets of regulations consistent with each other. Thus, in the Rehabilitation Act regulations concerning education, HEW used concepts imported from the EAHCA. See 45 C.F.R. Subtitle A, Appendix A at 299-302 (1981). The regulations applicable to preschool, elementary, and secondary education provide that recipients of federal assistance must "provide a free appropriate public education to each qualified handicapped

[10]continued from preceding page
public schools for non-handicapped students was $2,300, and for handicapped children was $6,456. More than $5.3 million was spent on providing services in a private residential setting.

Of the $5.3 million spent, the District of Columbia, received no reimbursements under the EAHCA for the more than 240 private placements, although it received approximately $200,000 for administrative expenses occasioned by general compliance with the EAHCA. The District was reimbursed for special education (provided to the approximately 2,500 children who are not in private facilities), in the sum of $786,280 in FY 1980.

Under the Elementary and Secondary Education Act of 1965, Pub. L. 89-313, 79 Stat. 1161, codified at 20 U.S.C. §2411(a)(5) (1976), repealed in part and amended in part by the Education Amendments of 1978, Pub. L. 95-561, Title 1, codified at 20 U.S.C. §§2701 *et seq.*, the District received $731.83 per placement in 1981. Using 1980 rates, therefore, the average cost for handicapped children in private facilities minus federal reimbursement in 1981 was $19,660.22 ($20,392.05 minus $731.83). See supplemental memorandum submitted in *Johnson et al.* v. *District of Columbia Bd. of Educ., et al.*, U.S. App. Nos. 82-1209, 82-1702, (D.C. Cir.) attached hereto as an Appendix.

person." 45 C.F.R. §84.33(a)(1981). Furthermore, the regulations provide that development of an Individualized Education Program (IEP), in accordance with the EAHCA, is one means by which a recipient may meet its responsibilities under the Rehabilitation Act. 45 C.F.R. §84.33(b)(2). In addition, the regulations provide that compliance with the procedural safeguards of §615 of the EAHCA also satisfies a recipient's obligations to establish procedures for the identification, evaluation, and education of handicapped children. See 45 C.F.R. §84.36 (1981). See also 34 C.F.R. §104.36 (1981).[11]

In 1978 Congress amended the Rehabilitation Act to provide that

> [i]n any action or proceeding to enforce or charge a violation of a provision of this title [29 U.S.C. §791 *et seq.*], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

§505(b) of the Comprehensive Rehabilitation Services Amendment Act of 1978, §120 of Pub. L. 95-602, 92 Stat. 2982, 1978 U.S. Code Cong. and Adm. News, p. 7312, codified as 29 U.S.C. §794a(b) (Supp. III 1979). However, as already stated, the EAHCA did not, and does not, provide for such awards. Accordingly, under *Alyeska*, in order for petitioners to be entitled to attorneys' fees, it is not sufficient for them to establish that their rights under the EAHCA have been violated; they must establish that their rights

[11] The validity of the Rehabilitation Act regulations is doubtful, for in *Southeastern Community College* v. *Davis*, *supra* 442 U.S. at 410-412 n.11, the Court has made it clear that the substantive provisions, insofar as they import concepts from the EAHCA, are largely invalid. See also, *Colin K. By John K.* v. *Schmidt*, *supra*, 715 F.2d at 9. See *Monahan* v. *Nebraska*, 687 F.2d 1164, 1169-1170 (8th Cir. 1982). "The regulations cannot grant more than that which Congress intended in enacting section 504." *Rollison* v. *Biggs*, 567 F.Supp. 964, 969 n.8 (D. Del. 1983).

The Court noted in *Southeastern* that, in any event, because HEW's position had been that Congress intended no regulations to implement the Rehabilitation Act until *Cherry* v. *Mathews*, *supra*, ordered otherwise, the deference to be given the interpretation of §504 by HEW (now the Department of Health and Human Services) is substantially diminished. 442 U.S. at 412, n. 11. See also *University of Texas* v. *Camenisch*, 451 U.S. 390, 399 (1981) (Burger, C.J., concurring).

under the Rehabilitation Act have been violated.[12] See *Turillo* v. *Tyson*, *supra* 535 F.Supp. at 585-588 (No fees awarded because only EAHCA violation and no Rehabilitation Act violation found); *Hines* v. *Pitt County Bd. of Ed.*, 497 F.Supp. 403, 409 (E.D. N. Car. 1980) (No attorney fees awarded because relief awarded only under EAHCA and not Rehabilitation Act). Cf. *Kruelle* v. *New Castle County Sch. Dist.*, 642 F.2d 687, 695 (3rd Cir., 1981) (Relief awarded appropriate only under EAHCA and not under Rehabilitation Act); *Pinkerton* v. *Moye*, 509 F. Supp. 107, 114 (W.D. Va. 1981).

**C. Petitioners could not have prevailed on their §504 claim, thus, they are not entitled to attorneys' fees.**

To obtain attorneys' fees under the Rehabilitation Act, where a party prevails under a non-fee statutory claim, the party must show that he or she would have prevailed under the Rehabilitation Act claim. It not enough that a "substantial" Rehabilitation Act claim has been alleged. However, even if it were, it is clear here that under this Court's decisions in *Southeastern Community College* v. *Davis*, *Rowley*, and *San Antonio Independent Sch. Dist.* v. *Rodriquez*, 411 U.S. 1 (1973), no substantial claim was presented.

The provision for recovery of attorneys' fees in the Rehabilitation Act, 29 U.S.C. §794a(b), was authored by Senator Cranston who stated that attorneys' fees were intended to provide for the private enforcement of

[12] In their *amicus* brief, the Association for Children and Adults with Learning Disabilities argue that §504 of the Rehabilitation Act provides for the same substantive rights as the EAHCA, namely, the right to a "free and appropriate education." Thus, in the Association's opinion, a violation of the EAHCA is *ipso facto* a violation of the Rehabilitation Act because, under §504, school districts have an affirmative obligation to provide "meaningful" special education programs at either a public or private school. To accept this argument this Court would have to overrule its decision in *Southeastern Community College* v. *Davis*, *supra*. The Association presents no basis for doing so. Indeed, in its brief filed on behalf of numerous *amici*, the Education Law Center recognizes that EAHCA claims are not necessarily §504 claims. *Amici* Brief at 14-15.

> rights extended to handicapped individuals of title V of the Rehabilitation Act of 1973—Federal Government employment, *physical accessibility* in public buildings, employment under Federal contracts, *and non-discrimination* under Federal grants * * *.

124 Cong. Rec. 30346 (September 20, 1978. (Remarks of Senator Cranston) (emphasis supplied). In construing §794a(b), Senators Cranston and Stafford noted that "the legislative history and expressions of legislative intent with respect to" the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. §1988, should be considered. *Id.*; 124 Cong. Rec. 3707-37508 (1978). In the legislative history of §1988, where Congress addressed the situation here—that is, where a non-fee claim is joined with a fee-generating non-constitutional statutory claim—Congress indicated that a determination on the merits of the fee-generating statute should be required to authorize fees. It did that when it stated (H.R. Rep. No. 1588, 94th Cong., 2d Sess. (1976) at 4, n.7):

> [t]o the extent a plaintiff joins a claim with one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, *if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. Morales* v. *Haines*, 486 F.2d 880 (7th Cir. 1980). [emphasis supplied]

Petitioners argue that the rationale of *Maher* v. *Gagne*, 448 U.S. 122, 132 (1980) requires a conclusion here that it is sufficient for attorneys' fees to be awarded if there is a "substantial question" under the fee-generating statute. However, the rationale of *Maher* does not apply here. As stated by the court in *Turillo* v. *Tyson*, *supra* 535 F.Supp. at 506, n.12: "The rationale for requiring nothing more than a non-frivolous constitutional claim is the well-established reluctance of courts to decide constitutional questions when statutory grounds are dispositive. * * * This rational does not apply to non-constitutional claims." Since the legis-

lative history quoted above indicates that "there must be a determination" on the fee-generating claim, and the policy considerations underlying *Maher* do not dictate otherwise, it seems clear that, in order to obtain fees under the Rehabilitation Act, a party must show that he would have prevailed under the statute, and not merely that his claim stated a substantial question thereunder. However, under this Court's holding in *Southeastern Community College* v. *Davis*, *supra*, particularly when read in light of *Rowley*, it is clear that plaintiffs could not have established any claim under §504. Therefore, no attorneys' fees could be awarded them in any event.[13]

This Court made it plain in *Southeastern Community College* v. *Davis*, *supra*, that the Rehabilitation Act requires only the elimination of discrimination against the handicapped; it is not an affirmative action statute requiring that recipients of federal aid take whatever steps might be necessary to provide the handicapped with an education suited to their special needs. Specifically, the Court held that the Rehabilitation Act did not require a school to make major adjustments in a program that it already provided to the general student population. That case involved a deaf woman who sought admission to a nursing program at a state college receiving federal funds. The college refused to accept her because permitting her to participate in the nursing program would have required substantial modifications in that program. The Court rejected the woman's contention that §504 required adjustments to the nursing program, stating that

[13] In light of *Turillo* v. *Tyson*, *supra*, it is clear that if it had considered petitioners' §504 claim, the district court would have held that petitioners could not have prevailed on that claim. In *Turillo* the same district court considered a Rhode Island school committee's refusal to pay for a handicapped child's education at Bradley Hospital, the same private facility involved here. The court concluded that no claim under §504 was stated because §504 "never compels a school system to finance a private educational placement." *Id.* at 588. Petitioners' here were seeking under §504 precisely the relief the district court in *Tyson* held was "never compell[ed]" by that statute.

> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps.
>
> * * *
>
> *Section 504 does not refer at all to affirmative action, and * * * it does not provide for implementation by administrative action.*
>
> [Moreover] neither the language, purpose, nor history of §504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds.

*Id.* at 410-411 (footnotes omitted, emphasis added). More specifically, the Court reasoned

> Section 504 by its terms does not compel educational institutions to * * * *make substantial modifications in their programs* to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap" * * *.

*Id.* at 405. The holding in the case was that "Southeastern's unwillingness to make major adjustments to its nursing program does not constitute such [§504-prohibited] discrimination." *Id.* at 413. The Court further noted that, while

> situations may arise where a refusal to modify an *existing* program might become unreasonable and discriminatory * * * [s]ection 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.

*Id.* at 412-413 (footnote omitted, emphasis added). The Court also made it clear that changes to existing programs were not required where they involved "undue financial and administrative burdens * * *." *Id.* at 412.

Under *Southeastern Community College* v. *Davis*, it is clear that relief could not have awarded under §504 in this case. There was no program offered by the Cumberland public school system that was appropriate for Thomas Smith in light of his severe physical and emotional handicaps. J.A. 33, 130. In order to meet his needs, it was necessary to spend $18,000 per year to educate him in a special private facility. J.A. 130.[14] Thus, in order to provide Thomas Smith with an appropriate education in light of his handicap, the school district would have had to make a modification (i.e. addition) to its existing program which, because of its expense, was plainly substantial. Under *Southeastern Community College*, that could not be required under §504. Indeed, a majority of the federal courts have concluded that §504 "does not obligate a school system to finance a private placement *under any circumstances* * * *." *William S.* v. *Gill*, 572 F.Supp. 509, 517 (N.D. ILL. 1983) (emphasis in original). See *Colin K. By John K* v. *Schmidt*, *supra*; *Kruelle* v. *New Castle County School District*, *supra* 642 F.2d at 695; *Rollison* v. *Biggs*, *supra* 567 F.Supp. at 969; *Turillo* v. *Tyson*, *supra*; *Pinkerton* v. *Moye*, *supra* 509 F.Supp. at 114.[15]

As previously pointed out, *Southeastern Community College* emphasized that the Rehabilitation Act is not an affirmative action statute. Of course, this is in contrast to the

[14] Indeed, the record shows that the facility deemed appropriate for Thomas Smith, cost more than double the per pupil cost of other placements. See J.A. 68.

[15] After *Davis*, the Courts have at most required that, under §504 of the Rehabilitation Act, schools must make reasonable modifications to *existing* programs to accommodate handicapped children. See *S-1* v. *Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981); *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980); *Camenisch* v. *Univ. of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated as moot*, 451 U.S. 390 (1981); *New York State Ass'n For Retarded Children* v. *Carey*, F.2d 644 (2d Cir. 1979). Cf. *Simon* v. *St. Louis County, Missouri*, 656 F.2d 316 (8th Cir. 1981). But cf. *Tatro* v. *State of Texas*, 516 F.Supp. 968, 985 (N.D. Texas 1981), *aff'd* 703 F.2d 823 (5th Cir.), *cert. granted sub nom Irving Independent School District* v. *Tatro*, U.S. No. 83-558, 52 U.S.L.W. 3435 (December 6, 1983).

EAHCA. However, petitioners' argument that §504 required the funding of Thomas' placement at Bradley Hospital is essentially an argument that accommodation must be made to meet his needs, whatever costs that entails. That argument is unquestionably rooted in affirmative action concepts. Yet under *Rowley*, *supra* 453 U.S. at 198, 204, n.26, it is not clear that even the EAHCA goes that far. See *Irving Independent School District* v. *Tatro*, U.S. No. 83-558 (which may resolve that EAHCA issue). *Southeastern Community College v.* Davis, *supra*, leaves no doubt that §504 does not go that far. In short, since petitioners' sought undeniable affirmative action relief, it is clear §504 cannot provide the basis for it.

Petitioners' complaint alleged that there was discrimination prohibited by §504 here because Thomas Smith was disadvantaged "because he has a particular handicapping condition, i.e., emotional disturbance, whereas [the School District] has not discriminated against other children with different handicaps". J.A. 16. It further equated §504 discrimination with conduct which violates the Equal Protection Clause. *Id.* However, the Court squarely rejected the notion that a school district must treat all handicapped children alike in *Rowley*, reasoning

> the requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. [458 U.S. at 198].

Furthermore, in *Rowley* the Court also rejected the notion that the Equal Protection Clause required "absolute equality of opportunity [for the handicapped] regardless of capacity" (*id.* at 199), and specifically noted that

> the Equal Protection Clause of the Fourteenth Amendment does not require States to expend equal financial resources on the education of each child. *San Antonio Independent School Dist.* v. *Rodriquez*, 411 U.S. 1 (1973); *McInnis v. Shapiro*, 293 F.Supp. 327 (ND Ill. 1968), aff'd *sub nom. McInnis* v. *Ogilvie*, 394 U.S. 322 (1969).

Therefore, the fourteenth amendment cannot require that a jurisdiction provide absolute equality of education opportunity for the handicapped regardless of cost. However, at bottom, that is precisely petitioners' argument. Accordingly, equating prohibited §504 discrimination with denial of equal protection cuts against, rather than for, petitioners here because it is clear that the School Board's conduct here did not violate the Equal Protection Clause.

However analyzed, then, it is plain that petitioners had no §504 claim here. Therefore, §504 could not properly serve as a basis for awarding them attorneys' fees.

## CONCLUSION

The decision of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted

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# APPENDIX

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 82-1209

JEROME JOHNSON, et al.,

v.

DISTRICT OF COLUMBIA BOARD OF EDUCATION, et al., *Appellants.*

No. 82-1702

RORY CAPELLO, a minor child, by his parents and next friends Dorothea and Olivero, et al.,

v.

DISTRICT OF COLUMBIA BOARD OF EDUCATION, et al., *Appellants.*

**Appeal From the United States District Court For The District of Columbia**

## APPELLANTS' SUPPLEMENTAL MEMORANDUM

In response to this Court's order of February 9, 1983, appellants state as follows:

1. Incremental cost of type of residential placement sought in *Johnson* and *Capello.*[1]

[1] All figures are taken from the affidavit of Douglas M. Jackson, Associate Legal Counsel for the District of Columbia Public School System, attached hereto as Exhibit A.

It should be noted that in computing the incremental costs for Jerome Johnson and Rory Capello we have not compared the costs of educating them at residential facilities with the costs of educating non-handicapped individuals of the same age. The differences would be greater.

a. The incremental cost for Rory Capello

(1) The cost of providing benefits to Rory at the Mamie D. Lee School, where the school system has recommended he be placed, is, for 1982-1983, $4,481.[2]

(2) The cost of providing benefits at the Concord School at which Roy's parents placed him, with the court's subsequent approval:

(A) For 1981-1982

| | |
|---|---|
| instruction | $ 8,000 |
| room and board | $10,600 |
| speech and therapy | $ 1,320 |
| | $19,000 |

(B) For 1982-1983 (if appropriate) $23,142.80[3]

(3) Difference in cost between placing Rory at Concord and Mamie D. Lee

(A) 1981-1982: at least $15,438

(B) 1982-1983: $18,661.80

(4) Reimbursement from federal government for placement (see subparagraph 1 c (3) below):

(A) 1981-1982: $731.83

(B) 1982-1983: $733.05

(5) Incremental cost of placing Rory at Concord School:

(A) 1981-1982: are least $14,706.17

(B) 1982-1983: $17,928.75.

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[2] The cost for the year 1981-1982 is not readily available. It is safe to assume, however, that the cost was not greater than for the current year.

[3] Rory is still residing at the Concord School as a result of his commitment under D.C. Code 1981, §§6-1901 *et seq*, See D.C. Super. Ct. No. MR-433-82. Appellants had suggested that he be committed under that statute in the Superior Court when this litigation began in the District Court.

b. The incremental cost for Jerome Johnson

(1) The cost of providing benefits to Jerome for placement at Mt. Pleasant in 1982-1983, as recommended by the school system: $2,719[4]

(2) The cost of providing benefits to Jerome at the New Dominion School, as sought by his mother and approved by the District Court:[4a]

(A) For 1981-1982

| | |
|---|---|
| instruction | $ 3,968 |
| room and board | $12,289 |
| | $16,257 |

(B) For 1982-1983: $16,259

(3) Difference in cost between placing Jerome at New Dominion, rather than Mt. Pleasant:

(A) 1981-1982: at least $13,538

(B) 1982-1983: $13,540

(4) Reimbursement from federal government for placement (see subparagraph 1 c (3) below):

(A) 1981-1982: $731.83

(B) 1982-1983: $733.05

(5) Incremental cost of placing Jerome at New Dominion:

(A) 1981-1982: at least $12,806.17

(B) 1982-1983: $12,806.95.

---

[4]The cost for 1981-1982 is not readily available. Presumably it was somewhat lower than the cost for 1982-1983. Mt. Pleasant was the recommended placement for Jerome.

[4a]The figures used here from 1982-1983 are solely illustrative since Jerome no longer resides at New Dominion. Jerome's probation expired in November 1980. In January 1982 Jerome left New Dominion.

c. Approximate incremental costs for average residential placements (i.e., placement in non-District of Columbia facilities).

(1) Approximate costs for providing educational services in the District of Columbia schools

(A) Schooling: Non-District residents who are not handicapped are charged the following fees for schooling:

(i) $1,583 for Junior High School

(ii) $1,510 for Senior High School

(iii) $2,300 for vocational training

(B) Handicapped Services: Non-District residents who have the following handicaps are charged the following fees:

(i) $6,456 for students with a physical or severe health related handicap or profoundly mentally retarded

(ii) $3,435 for students who are emotionally handicapped

(iii) $4,481 for students who are mentally retarded but trainable, and

(iv) $2,719 for students who have a learning disability or are educationally retarded.

(2) Average costs for providing services to students placed in private residential facilities:

The most recent figures that are available are for 1980-1981. For that year it was calculated that the average cost of providing such services for a sturdent for one year was $20,392.05 (with a range from $10,000 per pupil per year (e.g. the St. Gertrude School) to $100,000 per pupil per year (e.g. Emma Pendleton Bradley Hospital).[5]

[5]These figures were computed by first computing the cost, at then current (1980) rates, of maintaining for one year all 240 handicapped students that the District of Columbia was, under the EAHCA, then providing with services in a private residential setting as of January 1, 1980, and then adding the projected costs for the additional students who,

(Footnote 5 continued on next page)

(3) Average reimbursement from the federal government

(A) No reimbursements were received by the District of Columbia under the EAHCA for residential placements of handicapped students funded by the District. Under Department of Education regulations, such placements are not considered as having been made by a local educational agency (defined at 45 C.F.R. §121.3 (1976) (20 U.S.C. §1401 (8)). See 34 C.F.R. §300.706(b)(1982); 20 U.S.C. §1411 (c)(1). Reimbursements are also precluded since those children are "counted under section 121 of the Elementary and Secondary Education Act of 1965" as amended. 34 C.F.R. §300.702(a)(3); 20 U.S.C. §1411(a)(5).[6]

(B) The Elementary and Secondary Education Act of 1965, Pub. L. 89-313, 79 Stat. 1161. codified at 20 U.S.C. §241c(a)(5) (1976), repealed in part and amended in part by the Education Amendements of 1978, Pub. L. 95-561, Title 1, codified at 20 U.S.C. §§2701 *et seq.*, provides reimbursement for private residential placements and for children committed to state operated facilities. Under that statute,

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(Footnote 5 continued)

primarily as a result of pending cases, it was anticipated would be placed in a private residential setting.

The anticipated total amounts for all 260 actual and anticipated handicapped students was projected as follows: $3,409,700 (room and board) + $1,754,765 (special education instruction) + $117,768 (health care) + $19,880 (other) = $5,301,933.

[6] Placements in private residential facilities, however, are specifically authorized under EAHCA regulations. See 34 C.F.R. §300.302 (1982).

The District of Columbia, however, has received reimbursements for administrative expenses occassioned by compliance with the EAHCA (at approximately $200,000 per year) and for special education programs provided in public facilities where enrollment in the facility is limited to particular non-"statewide" areas. See 34 C.F.R. §300.706 (a) & (b) (1982). The District was reimbursed for special education (provided to the approximately 2,500 children who are not in residential facilities), per year, the sum of $786,280 in FY 1980, $675,848 in FY 1981, $668,848 in FY 1982, and $668,848 in FY 1983.

the District of Columbia received reimbursements, regardless of the actual costs, in the following amounts:

(i) In 1981: $731.83 per placement

(ii) In 1982: $733.05 per placement

(iii) In 1983: $692 per placement[7]

(4) Average incremental costs for handicapped children

(A) In D.C. facilities: $2,719 - $6,456

(B) In residential facilities: $10,000 - $1000,000 with an average of $20,392.05 (at 1980 rates)

(C) Differences (from the average): from $17,673.05 ($20,392.05 minus $2,719) to $13,936.05 ($20,392.05 minus $6,456)

(D) Minus federal reimbursement:

(i) In 1981 - $16,941.22 to $13,204.22 per placement

(ii) In 1982 - $16,940 to $13,203 per placement

(iii) In 1983 - $16,981.05 to $13,244.05 per placement

1.A. Number of handicapped children for which residential placement can reasonably be expected to be necessary.

In FY 1980, 240 children received residential placements and it was projected that 20 more would be so placed that year.

In FY 1981, an average of 182 children were residing in private residential facilities (high 203, low 172).

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[7] Reimbursement in a given fiscal is for the amount of pupils counted 2 years previously. Thus, in FY 1981, $2,296,513 was provided for 3,138 pupils counted on October 1, 1979; in FY 1982, $2,824,442 was provided for the 3,853 pupils counted on October 1, 1980; and in FY 1983; $2,668,445 has provided for the 3,853 pupils counted on October 1, 1981. Since, in 1980, there were 260 students in residential facilities and the District received $733 per placement, only $190,580 of the more than $2 million received went to reimbursement the District for $5.3 million spent on residential placements. The rest of the funds reimbursed the District for expenses related to educating and caring for committed children and students in non-local programs.

In FY 1982, (as of July 15) 168 students were in private facilities.

In 1983 (as of January 27) 184 children were placed in private residential facilities.

Whether such a placement is necessary, of course, begins with the individualized education program prepared for each handicapped child. Apparently, though, the number of children residing in private residential facilities has stabilized after 1980 as a result of the opening up of new facilities in the District of Columbia.[8]

1.B. The incremental benefits provided handicapped children in residential facilities include room and board, basic medical services, social case work, one-to-one supervision on a 24 hour basis and "indirect services" which includes laundry, recreation and entertainment (over and above physical education normally provided in non-residential facilities). In addition, those related services listed in 34 C.F.R. §300.13 (1982) which are provided in public or private day programs are also benefits provided students in private residential facilities.

* * *

[Other portions of the submission are not relevant here, but the complete Supplemental Memorandum has been lodged with the Clerk of the Court]

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[8]However, this figure may change rapidly in the near future as a result of litigation that has been brought seeking to have children previously committed to Forest Haven placed in private residential facilities under the EAHCA. See, e.g. *Bennett et al.*, v. *D.C. Bd. of Ed.*, Dist. Ct. No. 82-0224.

It should also be noted that since appellants' budget and the reimbursements received have not afforded the District the ability to meet its tuition expenses, the District has sought from Congress supplemental payments in FY 1980 in excess of $800,000 and in FY 1981 in excess of $400.000 to meet those expenses.

## APPENDIX

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 82-1209

JEROME JOHNSON, et al.,

v.

DISTRICT OF COLUMBIA BOARD OF EDUCATION, et al., *Appellants.*

No. 82-1702

RORY CAPELLO, a minor child, by his parents and next friends Dorothea and Olivero, et al.,

v.

DISTRICT OF COLUMBIA BOARD OF EDUCATION, et al., *Appellants.*

**Appeal From The United States District Court For The District of Columbia**

### AFFIDAVIT OF DOUGLAS M. JACKSON

District of Columbia, ss:

DOUGLAS M. JACKSON, having been duly sworn on oath, deposes and says:

1. I am Associate Legal Counsel to the Superintendent of the District of Columbia Public Schools. For approximately six years, I have served in that capacity with primary responsibilities for special education matters. I am the author of *The Plan For The Education of Handicapped and Exceptional Children in the District of Columbia*, approved on December 6, 1977, in *Mills* v. *Board of Education*, 348 F. Supp. 866 (D.D.C. 1972).

2. In such capacity, I am familiar with the litigation in the above-consolidated cases, this Court's Order of February 9, 1983, and with the records of the Board of Education, the District of Columbia Public Schools, and to some degree, records of the Department of Human Resources.

3. In reviewing pertinent records in response to the Court's first question in its Order of February 9, 1983, those records revealed that:

a. The cost of Rory Capello's residential placement at the Concord School in 1981 was $19,920 ($8,000 for instruction + $1,320 for speech therapy + $10,600 for room and board). Continued residence at the Concord School for 1982 and 1983 is $23,142.80. The cost of providing benefits to Rory at the Mamie D. Lee School, where it was recommended he be placed, is for 1982-1983, $4,481.00.

b. The cost of Jerome Johnson's residential placement at the New Dominion School in 1981 was $16,257 ($3,968 for instruction + $12,289 for room and board). Continued residence at the New Dominion School for 1982 and 1983 is $16,259.00. The cost of providing benefits to Jerome at the Mt. Pleasant Preparatory Program, where it was recommended he be placed, is for 1982-1983, $2,719.00.

4. The yearly costs stated for Mamie D. Lee amd Mt. Pleasant Preparatory Program are based upon rates approved by the Board of Education pursuant to 31 D. C. Code §§602 *et seq*, and as they appear in Attachment I.

5. Further review reveals that:

a. Handicapped students placed in regional full-time special programs, city-wide special education schools and programs, private day special education schools and programs, and private and public residential facilities and programs (i.e., "state operated" programs) do not generate federal funds under the Education for All Handicapped Children Act of 1975, P.L. 94-142, (EAHCA). Only handicapped students placed in regional part-time,

resource and itinerant special education programs usually located in "regular" schools (i.e., "local" programs) generate EAHCA funds. Under the EAHCA, the District was reimbursed for special education provided approximately 2,500 children in local programs in the sum of $786,280 in FY 1980, $675,848 in FY 1981, $668,848 in FY 1982 and $668,843 in FY 1983. Of that amount, up to $200,000 per year is allowed by the United States Department of Education for "state" administration expenses.

b. Pursuant to the Elementary and Secondary Education Act of 1965, the District of Columbia is provided funds to assist in supporting handicapped students placed in "state operated" programs, (i.e., regional full-time special education programs, citywide special education schools and programs, private day special education schools and programs and private and public residential facilities and programs. These students do not qualify to be counted for funding under EAHCA but qualify for all services and benefits accorded by EACHA. Funding in a given fiscal year is for the number of pupils in covered facilities/programs and counted 2 years previously. Thus, in FY 1981, $2,296,513 was provided for the 3,138 pupils counted on October 1, 1979; in FY 1982, $2,824,442 was provided for the 3,853 pupils counted on October 1, 1980; and in FY 1983, $2,668,445 was provided for the 3,853 pupils counted on October 1, 1981. Regardless of the cost of a private residential or other "special" day placement, the District approximately received, per pupil $731.83 in 1981, $733.05 in 1982 and $692.00 in 1983.

6. a. As of January 1, 1980, 240 handicapped children were in private residential facilities and entitled to a "free and appropriate education" under the EAHCA. It was projected that 20 additional children would be placed during the year. In 1981, as a result of new programs and facilities in the District, between 172 and 203 students were placed in private residential facilities. As of July 15, 1982, 168 students were so placed. As of January 27, 1983, 184 students were so placed.

b. In Fy 1980, the total cost for all 260 actual and expected students in private residential facilities was as follows: $3,409,700 (room and board); $1,754,675 (special education instruction); $117,768 (health care); and $19,880 (other), for a total of $5,301,933. The average placement cost was $20,392.05.

c. Cost of private residential placement, per pupil, range from approximately $10,000 a year at St. Gertrude School, Washington, D. C. (1980) to $23,000 a year at Concord School, West Virginia (1982), to $35,000 a year at the Avalon Center, Massachusetts (1982), to $40,000, $54,000, and $63,000 a year at The Brown School, Texas (1982), to $100,000 a year at Bradley Hospital, Rhode Island (1980).

7. To the end of securing additional funds for tuition for private facilities and programs, the District of Columbia sought and received from Congress supplemental appropriations in excess of $800,000 for FY 1980 and approximately $400,000 in FY 1981.

8. In addition to special education services, the benefits provided to those handicapped students placed in private residential facilities varies with the type of facility. Since some placements are in hospitals and other Acute Care Facilities, students so placed are receiving a program of medical treatment and habilitation. Those in Intermediate Care Facilities are receiving programs of custodial care and supervision and medical monitoring and habilitation and in some cases, programs of independent living. Generally, all students would receive room and board, basic twenty-four hour care and supervision, laundry, recreation, entertainment and emergency medical care.

/s/ DOUGLAS M. JACKSON

Subscribed and sworn to before me this 17th day of February, 1983, in Washington, D.C.

/s/ JOSEPH R. KINARD
*Notary Public, D. C.*

My Commission expires on: May 31, 1985

**PUBLIC SCHOOLS OF THE DISTRICT OF COLUMBIA**

**SCHEDULE OF PROPOSED NONRESIDENT TUITION RATES FOR THE 1982-1983 SCHOOL YEAR**

| | I. Yearly Rate | II. Half-Yearly Rate | III. Daily Rate |
|---|---|---|---|
| Senior High Schools[1] | $1,510.00 | $ 755.00 | $ 8.00 |
| Career Development Centers | 2,300.00 | 1,150.00 | 12.50 |
| Junior High Schools | 1,583.00 | 791.50 | 8.75 |
| Elementary Schools | 1,741.00 | 870.50 | 9.50 |
| Kindergarten and Pre-Kindergarten | | | |
| Full Day Session | 1,044.00 | 522.00 | 5.75 |
| Half-Day Session | 522.00 | 261.00 | 3.00 |
| Armstrong Adult Education Center | | | |
| Full Course (5 periods per day) | 404.00 | 202.00 | 2.25 |
| Less than 5 periods—rate per period | 81.00 | 40.50 | .50 |
| Adult Education Non-Credit Courses | | | |
| Full Course (5 periods per day) | 338.00 | 169.00 | 3.00 |
| Less than 5 periods—rate per period | 68.00 | 34.00 | .50 |
| Americanization School | | | |
| 5 Hours per Day (Full time) | 126.00 | 63.00 | .75 |
| 3 Hours per Day (A.M.) | 76.00 | 38.00 | .50 |
| 2 Hours per Day (P.M.) | 50.00 | 25.00 | .25 |
| Citizenship Course (6 weeks) | 10.00 | | |
| Evening Schools | | | |
| Full Program (3 hrs. per night) | 856.00 | 428.00 | 8.00 |
| Two-thirds Program (2 hrs. per night) | 571.00 | 285.50 | 5.00 |
| One—third Program (1 hr. per night) | 285.00 | 142.50 | 2.75 |
| Special Education Programs | | | |
| Physically Handicapped & Other Health impaired | 6,435.00 | 3,228.00 | 35.00 |
| Emotionally & Socially Handicapped | 3,435.00 | 1,717.50 | 18.75 |
| Trainable Mentally Retarded | 4,481.00 | 2,240.50 | 24.25 |
| Learning Disabled/Educable Retarded | 2,719.00 | 1,359.50 | 14.75 |
| Visually Impaired | | | |
| Full-time Program | 5,012.00 | 2,506.00 | 27.25 |
| Part-time[2] | 2,600.00 | 1,300.00 | 14.00 |
| Hearing Impaired & Communication Disorders | 3,321.00 | 1,660.50 | 18.00 |
| Deaf/Blind | 5,204.00 | 2,602.00 | 28.25 |
| Visiting Instruction[3] | | | |
| D.C. Youth Orchestra Programs | 225.00 | 112.50 | 1.25 |

**ATTACHMENT I**

Office - Supreme Court, U.S.
FILED
JAN 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 82-2120

IN THE

# Supreme Court of the United States

October Term, 1983

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Thomas F. Smith, Jr., et al.,
**Petitioner**,

v.

William P. Robinson, Jr., Rhode Island Associate Commissioner of Education, et al.,
**Respondents**.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

---

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National School Boards Association

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No. 82-2120

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1983

---

Thomas F. Smith, Jr., et al.
Petitioner,

v.

William P. Robinson, Jr.,
Rhode Island Associate Commissioner
of Education, et al.,
Respondents.

---

# AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

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## INTEREST OF THE AMICUS

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school board associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States.

Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq.

## ISSUE PRESENTED FOR REVIEW

Whether granting attorney's fees to "prevailing plaintiffs" in suits decided under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. (hereinafter the EAHCA) on the basis of the fee provisions of 42 U.S.C. § 1983 and

§ 504 of the Rehabilitation Act, 29 U.S.C. § 794, when no claims have been adjudicated under those provisions, is contrary to the intent of those fee provisions and in conflict with the purposes and policies of the EAHCA.

## ARGUMENT

### I. INTRODUCTION

The district court below, in awarding attorney's fees, committed a major error, which, if reinstated by this Court, will have a severe, negative impact on schools around the nation and on their efforts to educate this nation's handicapped children. The district court below rationalized its holding that the attorney's fees incurred by petitioner were reimburseable under 42 U.S.C. section 1988 on the sole basis that a "substantial" constitutional claim had been asserted in addition to the claim under the EAHCA. The

court noted that the EAHCA itself provides for no such fee remedy, and held that "even if [the constitutional] claims ultimately would not have prevailed," the attorney's fees were still reimburseable. Smith v. Cumberland School Committee, No. C.A. 76-0510, slip op. at 9 (D.R.I. April 30, 1982) (emphasis added). That reasoning would open the door to a torrent of unnecessary claims and "artful pleadings," all with the sole end of obtaining attorney's fees where they have not previously been authorized.

Petitioner argues that such a result is justified by the legislative history of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. section 1988, and this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980). Amicus contends, however, that a closer reading of the legislative history will reveal that results such as

those of the district court were not intended, and that petitioner's reliance on Maher, supra, is a misplaced reading of that case, in light of ensuing decisions by this Court, the purposes of the basic statutes involved, and sound judicial policy.

## II. TO ALLOW ATTORNEY'S FEES IN THE CASE AT BAR WOULD DISTORT THE INTENT AND CONCEPT OF THE "PRIVATE ATTORNEY GENERAL STATUTE," 42 U.S.C. SECTION 1988.

The Civil Rights Attorney's Fees Awards Act, supra, provides in relevant part that:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, [sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42], title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The statute was passed in reaction to this Court's decision in Alyeska Pipeline v. Wilderness Society, 421 U.S. 240 (1975), in which this Court refused to grant attorney's fees to private plaintiffs bringing suit to enforce a measure for the public good. Absent explicit authority from Congress, the Court held it could not modify the prevailing "American rule" which prohibited the granting of attorney's fees absent bad faith by the opposing party.

Petitioner, in relying on that portion of the measure's legislative history which seemingly allows the granting of attorney's fees even when no constitutional issue has been decided, overlooks the broader policies sought to be implemented by Congress in passing the Act. These broader implications, discussed below, indicate that the Attorney's Fees Act was never intended to serve as a means of gaining

fees in every single type of suit in which a constitutional claim could conceivably be brought, but was only intended to apply to a more limited class of actions.

In passing the Civil Rights Attorney's Fees Awards Act, supra, Congress was seeking merely "to remedy anomalous gaps in our civil rights laws," created by this Court's decision in Alyeska Pipeline, supra. S. Rep. No. 1011, 94th Cong., 2d Sess. 5909 (1976). After the Alyeska decision, fees might or might not be available to a prevailing party, depending under what measure they plead their case. For example, as the Senate report itself demonstrates, a claim of employment discrimination brought under title VII would entitle a prevailing plaintiff to attorney's fees; however, were the same claim to be brought under 42 U.S.C. section 1981, prior to the enactment of section

1988, no fees would be available. Similarly, a claim brought under title VIII alleging housing discrimination would bring with it a right to fees; the same claim brought under 42 U.S.C. section 1982 would not. Id. at 5911. Congress was, however, creating no startling new remedy. In each example, a provision for fees already existed in one form, and Congress was merely evening out the remedies so that whether the claim was under the Civil Rights Act of 1871 or a more specific statute such as title VII or VIII, attorney's fees would be available. No right ever existed, however, to attorney's fees under the EAHCA, because that act is not a civil rights act. To allow attorney's fees to be collected through section 1988 will result in a fee shifting not intended by the Congress.

Additionally, nothing in the history of section 1988 indicates that Congress intended section 1983 to be used as a conduit for suit under every conceivable type of statute which could allege a constitutional claim of one type or another. Rather, Congress wanted the statute to serve to encourage the enforcement by private individuals of civil rights laws--enforcement in the public interest. "Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality." H. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). "Congress has commonly authorized attorney's fees in laws under which 'private attorney generals' play a

significant role in enforcing our policies." S. Rep. No. 1011, supra, at 5910. Parties obtaining relief under such measures do so not for themselves alone, but also as a "private attorney general, vindicating a policy that Congress considered of the highest importance." Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

The type of statutes to which Congress was referring, however, in upholding this private attorney general concept, are generally prohibitory in nature, passed pursuant to Congress' powers under section 5 of the fourteenth amendment. Statutes such as title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, and section 504 of the Rehabilitation Act of 1973, are all addressed to federal departments and agencies which are acting as granting

agencies. Each of these statutes includes the words: "No person shall be subjected ... to discrimination under federally assisted programs and activities." These words are directed toward the federal agencies, prohibiting them from awarding grants and contracts to anyone who is subjecting any "person" to discrimination in the federally assisted program or activity. Thus, where private rights of action exist, the plaintiffs are, in effect, acting as private attorneys general seeking to enforce the prohibition against discrimination in federally assisted programs.

The EAHCA, however, is not a statute of such a nature. It is a grant statute and the mandates in the statute under which Petitioner claims relief are grant conditions which each state must assure are met before funding will be provided. It

was passed solely pursuant to Congress' spending power, and is not worded in terms of prohibition, but rather, establishes mandates that each state must achieve in order to obtain funding. As such, there is not the same need for the private attorney general.

Advocates of broad accessibility to section 1988 argue that it is necessary in order to insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights. "If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest." H. Rep. No. 1558, supra, at 6. Again, while such statements may be true in a general sense, when applied to the specific circumstances surrounding the EAHCA, their shortcomings become obvious.

Given the comprehensive nature of the substantive and procedural rights endowed by the EAHCA, discussed below, the public interest is not served by allowing suits for attorney's fees. Further, the entities most likely to get hit with fees here are not those with "substantial resources," as the Congress envisioned, id. at 7, but rather small local boards of education, struggling to meet conflicting demands for education services and balanced budgets, who have turned to federal funds to help in this battle. Just like damage remedies, which have been disallowed by several circuits under the EAHCA, e.g. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981), attorney's fees could "portend a potentially massive financial liability upon recipients of federal funds in excess of the amount of the funds received." Ruth Ann M. v. Alvin Ind. School

District, 532 F. Supp. 460, 473 (S.D. Tex. 1982).

In many instances, these suits are being brought with the aid of public interest organizations, so that merely denying fees in this context does not mean that parents will be denied their day in court. See, e.g., Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982) (awarding $5,052 in fees to legal services attorney); Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980) (permitting fee award to American Civil Liberties Union attorney); Gary B. v. Cronin, 542 F. Supp. 120 (N.D. Il. 1982) (awarding $66,288.75 in fees to attorneys from Legal Advocacy Service, 18 St. Legal Services and Legal Assistance Foundation of Chicago); Campbell v. Talladega County Board of Education, 518 F. Supp. 47 (N.D. Al. 1981) (awarding $36,700.18 in fees to legal services

attorneys); Mattie T. v. Holladay, 522 F. Supp. 72 (N.D. Miss. 1981) (awarding $105,887.63 for fees and expenses to attorneys from Children's Defense Fund). Many of these organizations are funded through voluntary contributions. Whatever the altruistic goals of these organizations, should the courts be allowed to force the taxpayer indirectly to contribute to them?

## III. THE COMPREHENSIVE NATURE OF THE EAHCA PRECLUDES THE NEED FOR EITHER SECTION 1983 OR SECTION 504 REMEDIES.

Unlike section 504 and the non-discrimination statutes which section 1983 and section 1988 seek to enforce, the EAHCA is a funding statute which sets forth specific requirements which states must meet. To allow the granting of attorney's fees through allegations of section 1983 and 504 claims would be completely at odds with the statute's purpose and structure.

The EAHCA is a funding statute under which states receive moneys to assist them in providing educational services to handicapped children. In return, those states accepting this "contract" must establish and maintain procedures whereby handicapped children and their parents can protect the children's right to a "free appropriate public education." 20 U.S.C. 1415(a-e). In passing the Act, Congress was seeking not only to codify already existing constitutional rights of handicapped children, but to establish a fair, thorough and efficient system of protecting those rights. 121 Cong. Rec. H. 7764.

Although measures like sections 1983 and 504 were already on the books, they were not enough to accomplish the Congress' objectives. A recurrent problem prior to the EAHCA was that "handicapped children

have always been slighted . . . [because] parents and advocates of these children have always had to look to a level of government higher than the local education agency to get help for the children." Id. The EAHCA changed that, however, by providing localized, easily accessible and understandable procedures whereby parents and the school systems could work together to solve any grievances they might have. At the same time, these procedures serve as a protective device, "speaking directly to the due process issues raised in Pennsylvania Association of Retarded Children v. Pennsylvania," 343 F. Supp. 279 (E.D. Pa. 1972), one of several cases which led to the enactment of the EAHCA. 121 Cong. Rec. H. 7764. Among these rights and procedures which schools must provide to handicapped children and their parents in order to qualify for funds are:

- an opportunity to present complaints with respect to any aspect of the child's education; 20 U.S.C. 1415(b)(1)(E)

- the opportunity for an impartial due process hearing by a local education agency; 20 U.S.C. 1415(b)(2)

- an impartial review by a state education agency; 20 U.S.C. 1415(c)

- the right to judicial review for any party aggrieved by the final decision of the state level agency; 20 U.S.C. 1415(e)(2)

- written notice to the parents before any changes in the child's placement or program; 20 U.S.C. 1415(b)(1)(B)

- an individualized education plan setting forth goals and services to be provided to the child, developed in consultation with the parents and educational experts; 20 U.S.C. 1401(19)

- annual review of the individualized program; 20 U.S.C. 1401(19)

- the opportunity to obtain an independent educational evaluation the results of which must be considered by the agency determining the child's educational needs; 20 U.S.C. 1415(b)(1)(A)

- the right to counsel as well as written or other permanent record of proceedings 20 U.S.C 1415(d).

The main point of these EAHCA procedures is not to interpose additional bureaucratic levels between the child and the education to which he or she is entitled, but rather to ensure that any decision reached has the full input of all parties concerned and serves the child's best interest. As Congressman Miller stated in debate on the EAHCA:

> Each [of the administrative safeguards and procedures] is designed to increase parental and professional input into the development of the program . . . and to safeguard the rights of children and parents. 121 Cong. Rec. H. 7764.

Unfortunately, however, the potential of an attorney's fees suit can easily upset the delicate balance of cooperation which the EAHCA strives to achieve. School officials may, based on their best judgment and the advice of experts, make a decision

concerning the placement of a child with which that child's parent disagrees. In the course of administrative procedures, however, the school district may become convinced that the parents are correct, and may concede to the parents' wishes. They may even concede to the parents just to stop the controversy, in the interest of the child, even when they believe the parents are incorrect. Yet such a change of heart can turn the parents into a "prevailing party" and, under the district court ruling, if they have also alleged section 1983 or section 504 claims, even though those claims are never addressed, entitle them to attorney's fees.

For example, in Espino v. Besteiro, 708 F.2d 1002 (5th Cir. 1983), the school district based its position as to the appropriate educational placement for the plaintiff-student on "good-faith compliance

with a reasonable interpretation of the law." Id. at 1005 (quoting from district court opinion). The parents, after exhausting their administrative remedies, turned to the court, as is their right under the EAHCA. After the district court granted a preliminary injunction in plaintiff's favor, the school district, rather than prolonging the litigation, worked out an arrangement satisfactory to all parties. While the district court, based on defendants' good faith, denied plaintiff's motion for attorney's fees, the appellate court reversed, using section 1988 as the basis for its decision. This was so despite the fact that the merits of plaintiffs' EAHCA claim were never fully litigated and that the constitutional claims were never even addressed by the lower court. Such rulings remove all incentive for the schools to work toward a

cooperative settlement or to make accommodations at any point. They rationalize that if they settle or concede, plaintiffs may become "prevailing" parties and they will have to pay fees, but if they continue to contest the issue, they may have a chance to win and avoid fees. Thus, the cooperative nature of the process developed by the Congress is turned on its head and changed into an adversarial proceeding.

Additionally, allowing suits under section 1983 or 504 when what are really being alleged are EAHCA claims provides the potential for plaintiffs to avoid the administrative remedies of the EAHCA. Section 1983 contains no exhaustion requirement. Patsy v. Board of Regents, 102 S. Ct. 2557 (1982). If all plaintiffs are doing in actuality is asserting a claim under the EAHCA, no matter how cleverly worded, they should not be allowed to

circumvent the EAHCA's procedures, procedures designed to encourage cooperation, not court suits. The same holds true for section 504 claims, where the generalized remedies of section 504 should not be utilized to circumvent the specifically enumerated administrative procedures of the EAHCA if this more specific act is applicable. To allow such a use of section 504 would be to seriously erode "the congressionally mandated requirement that state and local public education officials, and not the courts, initially review the merits of a plaintiff's claim." Rollinson v. Biggs, 567 F. Supp. 964 (D. Del. 1983).

In addition to its administrative procedures, the EAHCA is a complete remedy. Unlike the measure at issue in Maher v. Gagne, supra, where plaintiffs had to use section 1983 as a means of

access to the federal courts, the EAHCA contains provisions for judicial review in either state or federal courts. Thus, there is no need to ever turn to another measure to obtain relief. As this Court stated in Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1, 101 S. Ct. 2615 (1981):

> when the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under section 1983. 101 S. Ct. at 2626.

See also Brown v. G.S.A., 425 U.S. 820 (1976), holding that courts should look to the "balance, completeness, and structural integrity" of a statute in determining whether it creates an exclusive remedial scheme.

Further, this Congressional intent is not just to preclude enforcement of the

EAHCA under the "and laws" provision of section 1983, but also to prevent plaintiffs from utilizing the constitutional provision of 1983 as well. As the Ninth Circuit Court of Appeals recently stated:

> It is clear that where adequate alternative remedies remain available Congress may abrogate a statutory means for the enforcement of constitutional rights. The comprehensive nature of the remedies laid out in the EAHCA evinces a congressional intent to preclude reliance on either a statutory or a constitutional cause of action under section 1983. Katherine D. v. Hawaii Dept. of Education, ____ F.2d _____, slip op. No. 82-4096 (9th Cir. Nov. 7, 1983).

Petitioners assert that "Congress specifically stated that it did 'not intend' EAHCA enforcement 'to limit the rights of individuals to seek redress of grievances through other avenues such as bringing civil action[s] in Federal or

state courts to protect and enforce the rights of handicapped children under applicable law.'"(quoting S. Rep. No. 168, 94th Cong., 1st Sess. 26). They contend that, just as in the act at issue in Maher, supra, this is a "savings clause," preserving all other means of enforcing the rights at issue, and that Congress intended by this statement to leave the door open for redress of greivances through section 1983 for violations of the EAHCA.

When the statement is taken in its proper context, Congress' intent becomes clear. In context, the statement refers to the fact that the existence of the administrative procedures required by the EAHCA will not preclude the seeking of judicial relief. However, the means to obtain such relief are also provided in the EAHCA. 20 U.S.C. 1415(e)(2).

While this Court in Board of Education of Hendrick Hudson v. Rowley, 458 U.S. 176 (1982), has recognized that the EAHCA is primarily a procedural statute, it does impose substantive duties. As the appellate court below stated, "in enacting the EAHCA, Congress sought to ensure that handicapped children receive the very 'rights' that [petitioner] claimed were constitutional under section 1983." Smith v. Robinson, 703 F.2d 4, 8 (1st Cir. 1983). See S. Rep. No. 168, 94th Cong., 1st Sess. 6-7. This Court has intepreted this as the right to receive an "adequate" education, one that provides some "educational benefit" to the child. Thus, the EAHCA ensures more than the mere "non-discrimination" protected in section 504 and the Constitution. It establishes federal rights for handicapped children which have never been authorized or

provided to other students, e.g., the right of parents to participate in a meeting to develop an individualized educational program (IEP) for their child, the right of parents to present their own educational experts at such a meeting and the duty of the school district to listen to them, and the duty of the school district to receive permission from the parents before making any change in the placement of the child, to name but a few.

Special note should be made of the IEP requirements under the EAHCA. Amicus certainly agrees that the requirement, at least from a policy viewpoint, is a good one. It is a major underpinning of the EAHCA, and constitutes a primary basis for differentiating that statute from either section 504 or the Constitution, neither of which can require anything remotely similar. Certainly, every parent would

like to be assured that his child has a right to be personally evaluated by a group of experts every year to determine the child's individual needs and to set individual goals for that child. Every parent would like to have substantial input into the process through notice at every stage, the right to provide an independent evaluation which the district must review, and ultimately, the right to a hearing where there is a dispute. However, under federal law ONLY a specifically designated class of handicapped children -- not even all handicapped children -- have these rights, and they have them because the school district in which they live has chosen to accept funding under the EAHCA, not because of the Constitution or section 504. To make the district liable for attorney's fees in instances of dispute, merely because plaintiffs are able, through

careful wording of their complaint, to allege constitutional and 504 claims that in actuality merely restate the rights they are given under the EAHCA, is, at best, absurd. As one court has noted, "Plaintiffs, through artful pleading, should not be afforded the recovery of fees under a more generalized statute when the specifically applicable statute makes no provision for such a recovery." Rollinson v. Biggs, 567 F. Supp. at 970 (footnote omitted).

These arguments become especially compelling when the courts fail to even decide the constitutional or section 504 claims, but instead hold that, because the pleadings allege "substantial" claims, 448 U.S. at 132, and because the party prevailed in one form or another on its EAHCA claim, attorney's fees should be awarded. Such rulings encourage the filing

of section 1983 and 504 complaints in addition to the EAHCA complaint, with plaintiffs well aware that merely achieving a settlement on the EAHCA claim will suffice to get them attorney's fees under the other two measures.

The query should not be whether a court may, by choosing to ground its order on the EAHCA, deprive a plaintiff of attorney's fees to which he would have been entitled had the court based its decision on section 1983; but rather, whether plaintiffs should get fees to which they would otherwise not be entitled were it not for their clever pleadings. Too many courts, in awarding fees, assume that plaintiffs would have prevailed had their 504 or 1983 claims been litigated, but in actuality, those claims might not even have stated a cause of action were it not for the EAHCA. Yet the courts are left in a nightmare of trying to

determine which claims are "substantial" and which are not, in many instances without ever having gone to trial.

> From this twilight zone of uncertainty, the [c]ourt is thrust into a virtual fantasy world because the litigation settled before any disposition on the merits. The [c]ourt, therefore, finds itself in the absurd position of considering the constitutional claims in the surreal mileau of a motion for attorney's fees for claims that were neither fully developed by this [c]ourt nor considered by this [c]ourt in a decision on the merits. Rollinson v. Biggs, 567 F. Supp. at 971 (D. Del. 1983).

While courts should not "pass upon a constitutional question . . . if there is also some other ground upon which the case may be disposed of," Ashwander v. T.V.A., 297 U.S. 288 (1941)(Brandeis, J. concurring), in the context of attorney's fees it does become necessary to examine that Constitutional claim. Would it not be more efficient to either disallow such repetitive pleadings or to consider them

with the other claims, rather than to have to try to determine them after the fact in an attorney's fees proceeding.

Advocates of allowing fees under section 505 merely because a "substantial," but undecided, 504 claim has been alleged are on an even less steady footing. While it may be frowned upon judicially to decide a constitutional question when a statutory basis can be found, there is nothing to prevent the judiciary from addressing additional statutory claims merely because one has already been decided. Thus, courts should not be allowed to award attorney's fees on a "substantial" section 504 pleading unless violation of that measure has been specifically determined.

A closer look at section 504 provides even more support for such a policy, for violation of the EAHCA does not prima facie prove a violation of section 504. Section

504 is at once broader and narrower than EAHCA, Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982), cert. denied, 103 S. Ct. 1252 (1983), and where the two overlap, the EAHCA should control. "A precisely drawn, detailed statute pre-empts more general remedies." Brown v. GSA, 425 U.S. at 834.

Section 504, as noted above, is designed to assure that federal funds are not used to support programs and activities which discriminate against handicapped persons. There was no debate in the Congress on the provision and no committee reports exist to more fully develop the intent of Congress in passing the section. However, the Department of Education regulations under section 504 indicate that the provision is designed, at least in the context of education, to fill the gap where states such as New Mexico have refused

funding under the EAHCA. See 34 C.F.R. 104.36 (comment).

Section 504 is broader than the EAHCA in that, to fall within its bounds, a child must have "a physical or mental impairment which substantially limits one or more major life activities." 29 U.S.C. § 706 (7). The EAHCA definition, in contrast, is keyed to whether the child is in need of special education. If, for example, the only disability of a student is a missing leg, he or she would be "handicapped" under section 504 but would not be "handicapped" for purposes of the EAHCA. Additionally, section 504 is broader than the EAHCA in that it applies to all federal grantees, including transportation systems, hospitals, colleges and universities, etc., not just elementary and secondary schools.

Section 504 is also narrower than the EAHCA because it prohibits discrimination,

but does not make affirmative requirements. Southeastern Community College v. Davis, 442 U.S. 397 (1979) Questions involving the two measures merge in the primary and secondary education context only because states that receive EAHCA funding must create an array of services so as to provide some program from which each handicapped child can benefit. Identifying that program is much the same as determining appropriateness. "Section 504 would most clearly be a proper basis for a claim in this educational context in a case in which a child is completely excluded from all programs, because than the EAHCA inquiry, the appropriateness of the program, would not be a central issue." Timms v. Metropolitan School District, ____ F.2d _____, slip op. No. 82-3084 at n. 4 (7th Cir. Nov. 18, 1983). Under section 504, as long as a school

district does not preclude a child from receiving an education, it is irrelevant that the district never contacted the parents, never looked at the reports of the parent's independent evaluator, never gathered together the district's personnel to establish an IEP, etc.

It is also not clear whether the placement provisions of EAHCA under which petitioner's claim is made even apply under section 504. Certainly, under section 504, parents need not be consulted before a change in placement is made, although the EAHCA requires not just consultation but consent.

Even the Department of Education regulation under section 504 notes that developing an IEP is only "one means of complying with section 504." 34 C.F.R. 104.36 However, in order to be in compliance with the EAHCA, an IEP must be

formulated. There are also substantial differences in the due process requirements of section 504 and EAHCA. Since section 504 is a non-discrimination statute, handicapped students are entitled only to the same due process procedures provided to non-handicapped students, i.e., those required by Goss v. Lopez, 419 U.S. 565 (1975). The same is true under the United States Constitution and, thus, section 1983. On the other hand, EAHCA requires a full-scale hearing before an independent hearing examiner, provides for right to counsel and provides substantive rights such as a due process hearing before a change in placement is made if the parents and district disagree as to placement.

## IV. CONCLUSION

What purpose, then, does adding claims under section 1983 and section 504 serve in light of the comprehensive substantive and procedural system of rights that Congress included in the EAHCA? None whatsoever--except to serve as a conduit for attorney's fees not intended by Congress to be available. As counsel for petitioner himself has stated, in a recent article:

> [A]s a matter of litigation strategy, plaintiffs should normally assert substantive claims under all three of these provisions [the EAHCA, section 1983 and section 504] so as to afford themselves the greatest opportunity to secure an award of attorney fees. I. Bodensteiner, "Availability of Attorney Fees in Suits to Enforce the Educational Rights of Children with Handicaps," 5 Western New England L. Rev. 391, 392 (1983).

Amicus submits that the use of "artful pleading" should not be allowed to distort the clear intent of Congress in passing the various measures at issue here.

Respectfully submitted,

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Title: Thomas F. Smith, Jr., et al., Petitioners
v.
William P. Robinson, Jr., Rhode Island Associate Commissioner of Education, et al.

Court: United States Court of Appeals for the First Circuit

Counsel for petitioner: Larson, E. Richard

Counsel for respondent: Avila, Forrest L.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jun 22 1983 | G | Petition for writ of certiorari filed. |
| 2 | Aug 3 1983 | | DISTRIBUTED. September 26, 1983 |
| 3 | Aug 23 1983 | P | Response requested. (Due September 22, 1983 - NONE RECEIVED) |
| 5 | Sep 21 1983 | | Order extending time to file response to petition until September 28, 1983. |
| 6 | Sep 29 1983 | | Brief of respondents William P. Robinson, et al. in opposition filed. |
| 7 | Oct 5 1983 | | REDISTRIBUTED. October 28, 1983 |
| 8 | Oct 6 1983 | X | Supplemental brief of petitioners Thomas F. Smith, Jr., et al. filed. |
| 9 | Oct 31 1983 | | Petition GRANTED. |
| | | | ********** |
| 11 | Dec 8 1983 | | Order extending time to file brief of petitioner on the merits until December 30, 1983. |
| 12 | Dec 29 1983 | | Brief amicus curiae of Assn. for Children and Adults with Learning Disabilities filed. |
| 13 | Dec 29 1983 | | Brief of petitioners Thomas F. Smith, Jr., et al. filed. |
| 14 | Dec 29 1983 | | Joint appendix filed. |
| 15 | Dec 30 1983 | | Brief amicus curiae of Association for Retarded Citizens, etc., et al. filed. |
| 17 | Jan 30 1984 | | Brief of respondents William P. Robinson, et al. filed. |
| 18 | Jan 30 1984 | | Brief amicus curiae of National School Boards Assn. filed. |
| 19 | Feb 2 1984 | | Record filed. |
| 20 | Feb 2 1984 | | Certified original record & C.A. proceedings received. |
| 21 | Jan 30 1984 | | Brief amicus curiae of District of Columbia filed. |
| 22 | Feb 14 1984 | | SET FOR ARGUMENT. Wednesday, March 28, 1984. (1st case) |
| 23 | Feb 27 1984 | | CIRCULATED. |
| 24 | Mar 21 1984 | X | Reply brief of petitioners Thomas F. Smith, Jr., et al. filed. |
| 25 | Mar 28 1984 | | ARGUED. |